Supreme Court, U.S.
FILED
01 14 22 MAR 21 2002
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

DALLAS WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL E. MONNAT
Counsel of Record
MONNAT & SPURRIER, CHARTERED
221 South Broadway, Suite 512
Wichita, Kansas 67202
(316) 264-2800

Counsel for Petitioner

March 21, 2002

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

10488

QUESTIONS PRESENTED

1.

Fourth Amendment jurisprudence in many federal circuits cautions that an officer's questioning of a motorist during a routine traffic stop must not exceed the permissible scope of the stop. Trooper Nollette stopped Mr. Williams for speeding. During the stop, the trooper asked Mr. Williams investigative questions about Mr. Williams' travel plans. Did the trooper's questioning exceed the permissible scope of the stop for speeding?

2.

To pass Fourth Amendment muster, an investigatory detention must be justified by some objective manifestation that the person stopped is engaged in criminal activity. Trooper Nollette detained Mr. Williams after completing his traffic stop for speeding because of Mr. Williams' allegedly nervous appearance, his possession of a two-way radio, and his use of a car rented in his uncle's name. Under the totality of these circumstances, was the trooper's suspicion objectively reasonable?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding are contained in the caption of the case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENT FOR ALLOWANCE OF THE WRIT ... 6

I. The Trooper's Investigative Questions about Mr. Williams' Travel Plans Exceeded the Permissible Scope of the Stop for Speeding, and the Panel's Opinion Misapplied Other Circuit Holdings That Traffic-Stop Questions Must Not Exceed the Scope of the Stop 6

II. The Panel's Holding That Nollette Had Reasonable Suspicion to Detain Mr. Williams after Completing the Stop Gave Too Much Weight to Primarily Subjective Factors, and Conflicts with Other Courts' Treatment of Similar Factors..... 12

A. Nervousness 14

B. Two-Way Radio..... 17

C. Rental Car 18

CONCLUSION 20

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) 11

Florida v. Rodriguez, 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) 15

Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) 13, 14, 15

Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948) 16

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) 13

United States v. Arvizu, ___ U.S. ___, 122 S.Ct. 744, ___ L.Ed.2d ___ (2002) 12, 13, 14

United States v. Bloom, 975 F.2d 1447 (10th Cir. 1992) 15

United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) 14

United States v. Childs, 277 F.3d 947 (7th Cir. 2002) 8

United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) 14

United States v. Dortch, 199 F.3d 193 (5th Cir. 1999) 19

United States v. Hernandez, 93 F.3d 1493 (10th Cir. 1996) 10

United States v. Hernandez-Alvarado, 891 F.2d 1414 (9th Cir. 1989) 17

United States v. Hill, 195 F.3d 258 (6th Cir. 1999) 7

TABLE OF AUTHORITIES – Continued

Page

United States v. Holt, 229 F.3d 931 (10th Cir. 2000) 10

United States v. Holt, 264 F.3d 1215 (10th Cir. 2001) 9, 10

United States v. Kopp, 45 F.3d 1450 (10th Cir. 1995) 7

United States v. Little, 18 F.3d 1499 (10th Cir. 1994) 15

United States v. Morgan, 270 F.3d 625 (8th Cir. 2001) 7

United States v. Murillo, 255 F.3d 1169 (9th Cir. 2001) 7, 9

United States v. Ramos, 42 F.3d 1160 (8th Cir. 1994) 9

United States v. Rivera, 867 F.2d 1261 (10th Cir. 1989) 10

United States v. Santana-Garcia, 264 F.3d 1188 (10th Cir. 2001) 10

United States v. Smith, 263 F.3d 571 (6th Cir. 2001) ..7, 18

United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) 15

United States v. West, 219 F.3d 1171 (10th Cir. 2000) 10

United States v. Williams, 271 F.3d 1262 (2001) 1

United States v. Wood, 106 F.3d 942 (10th Cir. 1997) 15, 16

Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. Section 1254(1) 1

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV ..... *passim*

RULES

U.S. Sup. Ct. R. 12(7) 3

ARTICLES

David A. Harris, PARTICULARIZED SUSPICION, CATEGORICAL JUDGMENTS: SUPREME COURT RHETORIC VERSUS LOWER COURT REALITY UNDER *TERRY V. OHIO*, 72 St. John's L. Rev. 975 (1998) 13

OPINION BELOW

The Tenth Circuit Court of Appeals' opinion affirming the denial of Mr. Williams' motion to suppress is reported at *United States v. Williams*, 271 F.3d 1262 (2001). App. 1.

JURISDICTION

The Tenth Circuit panel filed its opinion in this case on November 28, 2001. App. 1. Mr. Williams timely filed a petition for rehearing en banc, and the Tenth Circuit denied that petition in an Order filed December 26, 2001. App. 33. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . "

STATEMENT OF THE CASE

This case presents two important questions for the thousands of Americans who travel daily on our country's roads and highways: (1) whether a law enforcement officer may stop a driver for speeding and then ask that

driver investigative questions about travel plans wholly unrelated to the speeding offense; and (2) whether a law enforcement officer may detain a driver beyond the time necessary for the traffic stop because that officer has a subjective impression that the driver is nervous, observes a family band radio in the car, and learns that the car was rented in a relative's name. Although the district court ultimately answered these questions in the affirmative, the court also described this case as "a close call." App. 25.

On the day before Easter, April 22, 2000, Dallas Williams was driving alone on east-bound Interstate Highway 70 across western Kansas when Kansas Highway Patrol Trooper Mitch Nollette stopped him for driving six miles per hour over the posted speed limit. App. 36, 58-59. Nollette took Mr. Williams' driver's license and the rental agreement for Mr. Williams' car. App. 37, 42. Nollette then asked Mr. Williams probing questions about the nature and purpose of his travel. App. 44, 57-58. Mr. Williams obligingly replied that he was traveling from Denver to Kansas City to pick up his sister for Easter. App. 57. His sister had traveled from her hometown of Chicago to Kansas City with a friend, and Mr. Williams was going to drive her from Kansas City to Denver because she did not like to fly. App. 59.

After this discussion, Nollette went back to his patrol car to conduct a routine driver's-license check and prepare a written warning. App. 42, 44. Once he confirmed that Mr. Williams' license was valid, he returned the license and rental agreement and gave Mr. Williams the warning ticket, saying, "thanks a lot, we'll see you." App. 42, 44, 46-47. But before Mr. Williams had time to leave,

Nollette asked if he would mind answering a few more questions. App. 47. Again Mr. Williams obliged, and Nollette asked whether Mr. Williams had anything illegal in the car. App. 47. Mr. Williams replied in the negative and Nollette asked for permission to search. App. 47. Although Mr. Williams exercised his right to refuse consent, Nollette detained Mr. Williams until a drug-detection dog could come to the location. App. 47.

Eventually a canine unit arrived, and after the dog walked around the car its handler claimed that it had indicated on the trunk. App. 48. Based on this information, Nollette searched the trunk and discovered marijuana that later served as the basis for a federal indictment charging Mr. Williams with possession of marijuana with intent to distribute. App. 49.

Mr. Williams filed a motion in the Kansas District Court to suppress the evidence discovered as a result of Nollette's search. Aplt. App. 10-34.[1] Mr. Williams' primary argument was that Nollette did not have a reasonable suspicion of criminal activity sufficient to detain Mr. Williams after returning Mr. Williams' license and rental agreement. *Id.* The district court conducted an evidentiary hearing on the motion. App. 35, *et seq.*

At the hearing, Nollette claimed that he detained Mr. Williams because he thought Mr. Williams was "very

---

[1] This and other documents referred to as "Aplt. App." were included in the record Appendix submitted to the Court of Appeals, but have not been included in Mr. Williams' Appendix to this Petition. *See* U.S. Sup. Ct. R. 12(7) (allowing citation or quotation "from the record, even if it has not been transmitted to this Court").

nervous" throughout the stop. App. 38. According to Nollette, Mr. Williams' hand "was shaking visibly," his voice "was shaking somewhat," and his upper lip was "twitching somewhat." App. 38. But Nollette admitted on cross-examination that he had never before met Mr. Williams nor heard him speak, and he was thus unfamiliar with Mr. Williams' usual appearance, demeanor, manner of speaking and level of steadiness. App. 50-51.

Nollette also claimed that he detained Mr. Williams because he noticed a two-way family band radio in Mr. Williams' car. Aplt. App. 173. But Nollette did not bother to ask Mr. Williams before detaining him why he had the radio. App. 60. And although Nollette claimed to have seen "numerous types of communication devices" used in connection to illegal activity, he admitted that "I believe this is the first radio of this type that I've seen." Aplt. App. at 173; App. 64. On the other hand, Nollette was familiar with the advertised uses of these radios, having seen the boxes in which they are sold on the shelf of a local store. App. at 64-65. He agreed that these types of radios are marketed as a way of keeping in touch with family and friends while engaging in activities such as hunting, fishing, biking, backpacking, hiking or skiing. App. 64-65. Nollette also agreed that Mr. Williams' stated destination – Colorado – is a popular place for many of these recreational activities. App. 64-65. Nollette admitted that radios such as the one he saw in Mr. Williams' car may be found in "[m]any vehicles of innocent travelers." App. 65.

Finally, Nollette claimed that he detained Mr. Williams because he noticed that Mr. Williams' car had been rented by a Steve Snobl and Mr. Williams' name was not

on the rental agreement. App. 42. Mr. Williams readily identified Mr. Snobl as his uncle, who had loaned the car to him. App. 45. Nollette found it "strange or unusual" that Mr. Williams "didn't have his name on the rental agreement and he was simply borrowing the car." App. 45. But Nollette never asked where Steve Snobl was. App. 46. He also did not attempt to contact the rental company for any further information about the car, but rather just "read over the rental agreement." App. 42.

After considering this testimony, the district court issued an order calling the case "a close call," but denying Mr. Williams' motion to suppress. App. 18-28. Mr. Williams subsequently entered a conditional plea of guilty to the indictment, reserving the right to appeal from the denial of the motion to suppress. Aplt. App. 72-73, 80.

Between his plea and sentencing, Mr. Williams filed a motion to reconsider the denial of his suppression motion, arguing that Nollette's questions to Mr. Williams about travel plans exceeded the permissible scope of the stop for speeding. Aplt. App. 81-97. The district court considered this motion on its merits, but denied it as well. App. 29-33. The district court then sentenced Mr. Williams to imprisonment for a term of thirty-seven months. Aplt. App. at 105. Mr. Williams appealed to a panel of the Tenth Circuit Court of Appeals, which rejected both his scope and his reasonable-suspicion arguments in a published opinion. App. 1. The Tenth Circuit denied Mr. Williams' petitions for rehearing and rehearing en banc. App. 33-34.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I.

The Trooper's Investigative Questions about Mr. Williams' Travel Plans Exceeded the Permissible Scope of the Stop for Speeding, and the Panel's Opinion Misapplied Other Circuit Holdings That Traffic-Stop Questions Must Not Exceed the Scope of the Stop

A traffic stop constitutes a "seizure" of a "person" within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Consequently, traffic stops must not be "unreasonable" under the circumstances. *Id.*

The district court held that Nollette's questions about Mr. Williams' destination and route "were routine questions about his travel plans," and "were questions that a traveler would expect as a part of ordinary conversation and were not incriminating in nature." App. 30. The Tenth Circuit panel similarly downplayed the intrusive nature of such questions, holding that "such questions do typically fall within the scope of a traffic stop," and that "citizens' legitimate privacy interests are protected in that they are not legally obligated to answer such questions." App. 8. Thus, both the district court and the Tenth Circuit panel held that Nollette's questions were reasonable and did not exceed the scope of the stop for speeding. The panel was overly nonchalant about the purpose and effect of this type of questioning, and its conclusion that such questions are reasonable misapplied other circuit holdings (including holdings in the Tenth Circuit) that traffic-stop questions must not exceed the scope of the stop.

Questions about travel plans are "routine" only insofar as law enforcement officers seem to ask them "routinely" as a deliberate method of creating reasonable suspicion. *See, e.g., United States v. Hill*, 195 F.3d 258 (6th Cir. 1999) (officer followed defendants in U-Haul because of his experience that U-Hauls carry narcotics, stopped defendants for traveling seven miles over posted speed limit, asked questions about travel plans, and then relied in part on defendants' inconsistent answers as reasonable suspicion to detain defendants further); *United States v. Morgan*, 270 F.3d 625 (8th Cir. 2001) (officer stopped defendant for speeding, asked questions about travel plans, and then relied in part on defendant's and companion's divergent responses as reasonable suspicion to detain defendant further); *United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001) (officer stopped defendant for following another vehicle too closely, asked questions about travel plans, and then relied in part on defendant's inability to explain his plans adequately as reasonable suspicion to detain defendant further); *United States v. Kopp*, 45 F.3d 1450 (10th Cir. 1995) (officer stopped defendant for speeding, asked questions about travel plans, and then relied in part on defendant's implausible answers as reasonable suspicion to detain defendant further). Understanding the investigative uses of such questions, one district court recently advised an officer explicitly that had the officer "fleshed out the details concerning the trip to Arkansas better or if he had developed some inconsistencies in [the suspects'] stories, then he may have had some support in establishing a reasonable suspicion of illegal activity." *United States v. Smith*, 263 F.3d 571, 588 (6th Cir. 2001) (quoting district court's

opinion granting suppression motion in absence of evidence of inconsistent or suspicious travel plans).

Not only are questions about travel plans investigatory rather than merely conversational, the ordinary traveler cannot reasonably be expected to decline to answer such questions, particularly if they are posed while an officer is holding the driver's license and other essential documents. As one circuit judge has noted, questions asked during casual consensual encounters and questions asked during detentions have a fundamentally different effect on the person questioned:

> The majority comments blithely that the detainee can refuse to answer the questions posed by the police officer. How many times have you refused to answer questions asked by a police officer who has pulled your car over for a traffic offense? On the other hand, in a conversation between passengers seated on an airplane, where neither is exercising authority over the other, there would be nothing unusual about changing the subject if an embarrassing question were asked. There is simply all the difference in the world in the nature of the relationship between a police officer detaining someone for questioning and a police officer striking up a conversation on the bus. If the questions strayed far afield, one situation would present an invasion of privacy and the other would not.

United States v. Childs, 277 F.3d 947, 960 (7th Cir. 2002) (Cudahy, J., concurring in judgment but disagreeing with majority's conclusion that traffic-stop questions need not be related to basis for stop so long as they do not prolong stop's duration).

Prior to the panel's decision in Mr. Williams' case, the Tenth Circuit had just reiterated the rule that the reasonableness of a traffic stop depends on both the scope and the duration of the detention:

> . . . we conclude that the Fourth Amendment reasonableness of a traffic stop based on probable cause must be judged by examining both the length of the detention and the manner in which it is carried out.

United States v. Holt, 264 F.3d 1215, 1230 (10th Cir. 2001) (en banc) (holding that, given concerns about officer safety, questions about loaded weapons during a traffic stop need not be predicated upon reasonable suspicion). This rule is followed in at least the Eighth and Ninth Circuits as well as in the Tenth Circuit. *See, e.g., United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001) (cautioning that "[d]uring a traffic stop, a police officer is allowed to ask questions that are reasonably related in scope to the justification for his initiation of contact. In order to broaden the scope of questioning, he must articulate suspicious factors that are particularized and objective") (internal citations omitted); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994) (noting that traffic stop questions must be "reasonably related to the stop").

In rejecting Mr. Williams' claim, the panel did not disagree that questions must be reasonably related to the purpose of the stop, but relied on prior Tenth Circuit cases to hold that questions about travel plans are commonly accepted as "routine" and therefore reasonable. App. 7-8. But none of these cases explain why it is reasonable for an officer to ask about travel plans if such questioning is unrelated to the purpose of the stop. *See United*

States v. Santana-Garcia, 264 F.3d 1188, 1193 (10th Cir. 2001) (noting without further explanation that "[q]uestions about travel plans are routine and may be asked as a matter of course without exceeding the proper scope of a traffic stop"); *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000) (same); *United States v. Hernandez*, 93 F.3d 1493, 1499 (10th Cir. 1996) (noting without further explanation that "routine questions" such as those about the traveler's destination "may be asked as a matter of course without exceeding the proper scope of a traffic stop"); *United States v. Rivera*, 867 F.2d 1261, 1263 (10th Cir. 1989) (noting without further explanation that officer "could legitimately ask questions relating to the identity and travel plans" of driver stopped for a traffic offense).

In contrast to these cases, Tenth Circuit Judge Ebel has suggested that if traffic-stop questions must be related to the scope of the stop, then questions about travel plans might be unreasonable during stops for most traffic offenses, including speeding:

> When a car is stopped for speeding or for a straightforward traffic violation, as opposed to being stopped on suspicion that the driver is falling asleep or driving erratically (in which case the officer would be legitimately concerned with how much further the driver intended to travel), it is difficult to explain how questions concerning the travel plans of the occupants are reasonably related to the circumstances which justified the stop.

United States v. Holt, 229 F.3d 931, 942 (10th Cir. 2000) (Ebel, J., dissenting), *vacated by* 264 F.3d 1215 (10th Cir. 2001) (en banc).

In Mr. Williams' case, questions about Mr. Williams' travel plans were not at all related, much less reasonably related, to the stop for speeding. It was unnecessary for Nollette to gather any information about Mr. Williams' travel plans in order to check Mr. Williams' license, verify that the rental car was not stolen, and issue a citation or a warning.

Instead, Nollette's questions were part of an investigation for "general crime control purposes" unrelated to the speeding violation for which he stopped Mr. Williams, and they do not fall into any articulable exception to the rule that traffic-stop questions must not exceed the scope of the stop. *Cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 41, 44, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (holding that drug checkpoints did not fall within "limited exception to general rule that a seizure must be accompanied by some measure of individualized suspicion"; warning, "[w]e cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime"). That investigative questions about travel plans during traffic stops are "routine" does not mean such questions are reasonable or tolerable under the Fourth Amendment. *Id.* (holding that fact that stops at drug checkpoint were not discretionary and were each conducted "in the same manner until particularized suspicion develop[ed]" was not sufficient to declare stops reasonable under Fourth Amendment).

The Tenth Circuit panel's conclusion that Nollette's questions about travel plans were reasonable gave too little consideration to the investigative and intrusive nature of such questions, and it misapplied the Tenth

Circuit's and other circuits' holdings that questioning during a traffic stop may not exceed the scope of the stop. Review of this issue is appropriate and necessary, not only to correct the Fourth Amendment violation in Mr. Williams' case, but to instruct the lower courts about what sorts of questioning might exceed the scope of a traffic stop.

II.

The Panel's Holding That Nollette Had Reasonable Suspicion to Detain Mr. Williams after Completing the Stop Gave Too Much Weight to Primarily Subjective Factors, and Conflicts with Other Courts' Treatment of Similar Factors

The Tenth Circuit panel held that "[u]nder the totality of the circumstances, we conclude that Mr. Williams' extreme nervousness, the presence of the short-range radio, and the discrepancy in the rental agreement all provided the officer with sufficient reasonable suspicion to detain Mr. Williams for the purpose of performing a canine drug search." App. 17.

This Court recently re-emphasized that reasonable-suspicion determinations must be made by reference to "the totality of the circumstances." *United States v. Arvizu*, ___ U.S. ___, 122 S.Ct. 744, ___ L.Ed.2d ___ (2002). But this Court's guidance is further needed to delineate the outer limits of judicial deference to a law enforcement officer's judgment about allegedly suspicious factors that are by their nature subjective. Distinctions between the two most recent cases in which this Court found reasonable

suspicion and Mr. Williams' case illustrate the need for review in this case.

In *United States v. Arvizu, supra,* this Court held that a border patrol agent's reliance on a combination of suspicious factors to stop a car on a little-traveled route used by smugglers was reasonable. *Id.,* 122 S.Ct. at 752. In *Illinois v. Wardlow,* this Court held that the defendant's unprovoked headlong flight from officers in a high-crime area gave the officers reasonable suspicion sufficient to justify their stop of the defendant. *Illinois v. Wardlow,* 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). In both of these cases, a primary factor supporting reasonable suspicion was the location of the stop. As this Court noted in *Wardlow,* "[a]n individual's presence in a 'high crime area,' standing alone, is not enough to support a reasonable, particularized suspicion of criminal activity, but a location's characteristics are relevant in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Id.,* 528 U.S. at 119. Whether an area is a "high crime area" or is commonly "used by smugglers" is an objective fact that can be proven through statistics. *See* David A. Harris, PARTICULARIZED SUSPICION, CATEGORICAL JUDGMENTS: SUPREME COURT RHETORIC VERSUS LOWER COURT REALITY UNDER *TERRY V. OHIO,* 72 St. John's L. Rev. 975, 999 (1998) (rejecting position that a stop pursuant to *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) stop might be justified by unsubstantiated claims that it occurred in a "high crime area," but noting that "statements backed by arrest and crime statistics and by discussion of the testifying officer's own experience that a particular type of crime prevails in a particular location . . . deserves at least some weight"). In

both *Arvizu* and *Wardlow*, then, the detaining officer was held to have objective particular knowledge about the place where he stopped the suspect. In Mr. Williams' case, in contrast, Nollette made no claim to having experience or statistics to suggest that the area where he stopped Mr. Williams was known as a drug-trafficking route. Rather, he relied on more subjective factors that were not entitled to as much deference as an objective factor such as location. "An investigatory stop must be justified by some *objective* manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) (emphasis supplied).

Given the more subjective nature of the three factors relied on by Nollette and the courts below, it is not surprising that the panel's decision conflicts with other courts' evaluation of similar factors. Those conflicts will be illustrated below:

A.

Nervousness

The panel held that "we see no reason in this case to ignore Mr. Williams' nervousness in reviewing the totality of the circumstances," and relied on this as one of the three factors said to have given Nollette a reasonable suspicion justifying the continued detention. App. 11.

In *Wardlow, supra*, this Court held that "[o]ur cases have . . . recognized that nervous, evasive *behavior* is a pertinent factor in determining reasonable suspicion." 528 U.S. at 124 (emphasis supplied), *citing United States v. Brignoni-Ponce*, 422 U.S. 873, 885, 95 S.Ct. 2574, 45 L.Ed.2d

607 (1975); *Florida v. Rodriguez*, 469 U.S. 1, 6, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) (per curiam); *United States v. Sokolow*, 490 U.S. 1, 8-9, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). But *Wardlow* and the cases cited therein for this proposition all involved discussions of specific *behavior* that was both nervous and evasive, not simply general nervousness such as that Nollette claimed to witness in Mr. Williams. *See Wardlow* (upholding stop based on unprovoked flight from high-crime neighborhood); *Brignoni-Ponce*, 422 U.S. at 885 (noting that "[t]he driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion"); *Rodriguez*, 469 U.S. at 6 (upholding stop where suspects had "spoken furtively to one another" upon spotting plainclothes officers and respondent "made strange movements in his attempt to evade the officers"); *Sokolow*, 490 U.S. at 8-9 (noting that while "taking an evasive path through an airport" might be "highly probative" of criminal activity it does not carry any "ironclad significance").

The generalized nervousness Nollette claimed to witness in Mr. Williams has met in the circuit courts with less deference than claims of specific nervous behavior such as those involved in the cases above. The Tenth Circuit itself recognized prior to Mr. Williams' case that "nervousness" is subjective. *See United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997); *United States v. Bloom*, 975 F.2d 1447, 1458 (10th Cir. 1992) (explaining that officer's statement "that Defendant appeared 'very nervous' and 'somewhat excited' is a subjective evaluation of Defendant's behavior"), *overruled in part on other grounds, United States v. Little*, 18 F.3d 1499, 1504 (10th Cir. 1994). In *Wood*,

a highway patrol trooper stopped the defendant for speeding and then detained him further because of the defendant's "unusual travel plans," his "prior narcotics convictions," and his "nervousness," which was described as follows: "his breathing was rapid, his hands trembled as he handed over his driver's license, and he cleared his throat several times." 106 F.3d at 946-48. The *Wood* panel held that the detention was not supported by reasonable suspicion, in part because the evidence of nervousness was merely "generic." *Id.* at 948. Mr. Williams' panel described the same constellation of nervous features and yet found them to be objectively particularized. The fact that two different panels of the same circuit are able to view this matter in such different ways demonstrates that nervousness is not being judged objectively or consistently in the circuit courts. This case well illustrates the problem of using such subjective impressions as Nollette's to meet the objective standard of reasonable suspicion. Reliance on subjective impressions merely abandons the Fourth Amendment to the malleable testimony of "zealous officers . . . engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

The panel's decision in Mr. Williams' case cannot be reconciled with the Tenth Circuit's decision in *Wood*. In accepting Nollette's subjective descriptions of nervousness, the panel elevated the officer's subjective impression of nervousness to the level of objective reasonableness. Review in this case is appropriate and necessary to guide the lower courts in evaluating generic

claims of nervousness that are not accompanied by specific evasive behavior.

B.

Two-Way Radio

The panel also deferred to Nollette's claims that Mr. Williams' possession of a two-way radio was suspicious, holding that "the radio in this case contributed substantially to the officer's suspicion that criminal activity was afoot." App. 12. This deference to Nollette's claim that the mere presence of a two-way radio – of a type he had admittedly never seen before in connection with a trafficking offense – was sufficient in combination with the other two factors to provide reasonable suspicion conflicts with at least one other circuit court's consideration of similar evidence. In *United States v. Hernandez-Alvarado,* the Ninth Circuit rejected a claim that the presence of a radio antenna on a vehicle contributed to reasonable suspicion to stop the car. *United States v. Hernandez-Alvarado,* 891 F.2d 1414, 1415 (9th Cir. 1989). The court observed that the officer "did not notice any gestures to indicate that defendant *used* a radio." *Id.* (emphasis supplied). Likewise, in Mr. Williams' case, Nollette offered no evidence that he saw Mr. Williams using the radio, and its mere presence in his car was given far too much weight by the courts below. Review on the issue of what weight the mere presence of alleged trafficking devices should receive in reasonable-suspicion calculations absent evidence of actual use – particularly when those devices may be innocently owned – is appropriate and necessary

to clarify the outer limits of reasonable-suspicion calculations.

C.

Rental Car

Finally, the panel held that the district court gave appropriate weight to Nollette's claimed knowledge "that drug couriers often use third-party rental cars." App. 14. The panel's deference to the officer's claim of suspicion based on this factor was far too deferential, and conflicts with other circuits' treatment of similar factors. In *United States v. Smith*, the Sixth Circuit held that an officer did not have reasonable suspicion to detain the defendants after completing a traffic stop notwithstanding the government's claim that nine suspicious factors were present, including nervousness and the fact that "neither of the defendants was listed on the rental agreement as an authorized driver." *United States v. Smith*, 263 F.3d 571, 588 (6th Cir. 2001). The court was unimpressed with the government's reliance on the rental agreement, observing that the detaining officer "was apparently satisfied with the explanation that the authorized driver . . . had rented the vehicle and granted [the defendant] permission to use it." 263 F.3d at 592. The court further noted that the officer "did not contact the rental company to report the discrepancy," and "asked no further questions concerning [the defendant's] use of the vehicle, and did not verify the information which he had received from [the defendant]." *Id.* In a similar vein, the Fifth Circuit rejected a claim that the defendant's use of a third party's rental car

contributed to reasonable suspicion justifying the defendant's continued detention after a traffic stop in *United States v. Dortch*, 199 F.3d 193 (5th Cir. 1999). The *Dortch* court noted that "[e]ssentially, the government asks us to find that officers have reasonable suspicion to suspect drug trafficking anytime someone is driving a rental car that was not rented in his name," and held "to the contrary," noting that the detaining officer was able to rely on a computer check to ensure that the car had not been stolen. 199 F.3d at 199.

The Tenth Circuit's unquestioning deference to the officer's reliance on this factor conflicts with the Fifth and Sixth Circuits' more skeptical evaluation of this factor. Review in this case is appropriate and necessary to clarify what weight should be given factors such as this, particularly when they appear in combination with other innocence-consistent and highly subjective factors such as were present here.

CONCLUSION

This case presents two important Fourth Amendment questions that will continue to arise and be decided inconsistently in future cases if this Court does not grant review and offer guidance to the lower courts. For all of the reasons set forth above, Petitioner Williams respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari and allow him to submit a Brief on the Merits of his case.

Respectfully submitted by:

DANIEL E. MONNAT
MONNAT & SPURRIER, CHARTERED
221 South Broadway, Suite 512
Wichita, Kansas 67202
(316) 264-2800

Counsel for Petitioner

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
vs.	)	
DALLAS WILLIAMS,	)	No. 00-3365
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. 00-CR-10068-WEB)

(Filed Nov. 28, 2001)

Submitted on the briefs:*

James E. Flory, United States Attorney and Lanny D. Welch, Assistant United States Attorney, Wichita, Kansas, for Plaintiff-Appellee.

Daniel E. Monnat, Monnat & Spurrier, Chartered, Wichita, Kansas, for Defendant-Appellant.

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1 (G). The cause therefore is ordered submitted without oral argument.

Before **KELLY** and **ANDERSON**, Circuit Judges and **STAGG****, District Judge.

KELLY, Circuit Judge.

Defendant-Appellant Dallas Williams appeals from the denial of his motion to suppress pursuant to a conditional plea. He was convicted of possession with intent to distribute approximately 230 pounds of marijuana, and sentenced to thirty-seven months in prison and a three-year term of supervised release. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

Background

On April 22, 2000, at approximately 2:15 p.m., Kansas Highway Patrol Trooper Mitch Nollette stopped Mr. Williams for going seventy-six miles per hour in a seventy mile per hour speed zone. The officer, traveling westbound on Interstate 70, had used radar to clock Mr. Williams, who was traveling eastbound in a Lincoln Town Car. The officer approached the car and spoke with Mr. Williams, who was the sole occupant of the vehicle. The officer explained to Mr. Williams that he had stopped him for speeding and asked to see his license. Mr. Williams produced an Illinois driver's license that showed Mr. Williams to be a resident of Chicago. The officer noticed at the outset of the stop that Mr. Williams exhibited

---

** The Honorable Tom Stagg, Senior District Judge, United States District Court for the Western District of Louisiana, sitting by designation.

"exceptional or extreme" nervousness. In making his assessment of Mr. Williams' nervousness, the officer noted that Mr. Williams spoke with a trembling voice, his upper lip would "twitch somewhat" when the officer asked a question, and his hand shook visibly when he presented his driver's license to the officer. The officer noted that Mr. Williams' nervousness never dissipated throughout the entire stop. During this initial approach to the car, the officer also observed a "walkie-talkie" type radio on the front passenger seat, several packs of cigarettes in the front interior, and a green duffle bag in the back seat. The officer recognized the radio as one commonly sold and which had a range of only one to two miles.

While handing his license to the officer, Mr. Williams stated that the car was a rental and provided the rental agreement for the car to the officer. *Id.* at 233. At some point during this initial approach, but while still holding the license and rental agreement, the officer inquired as to Mr. Williams' travel plans. Mr. Williams told the officer that although his sister was from Chicago, she had traveled from Chicago to Kansas City with a friend. Mr. Williams explained that his family was having an Easter gathering the following day in Denver, and due to his sister's fear of flying, he was driving to Kansas City to pick her up and bring her to Denver.

The officer brought the materials back to his patrol car and ran a routine check to ensure the license was valid, which it was. Mr. Williams' name, however, appeared nowhere on the rental agreement for the vehicle. Instead, the rental agreement contained only the name "Steve Snobl" as a lessee and indicated that the

vehicle had been rented in Phoenix, Arizona. When the officer returned to the vehicle and questioned Mr. Williams about the discrepancy on the rental agreement, he explained that Steve Snobl was his uncle and had lent the car to him for the purpose of picking up his sister. Despite the officer's indication in his testimony that Mr. Williams' nervousness, possession of a radio commonly used by people driving in tandem, unusual travel plans, and lack of authority to be in possession of the rental car caused him to be suspicious, the officer returned the license and rental agreement to Mr. Williams. In addition, the officer said something to the effect of, "Thanks a lot. We'll see you." The officer then, however, asked Mr. Williams if he would mind answering a few additional questions, to which he agreed.

The officer first asked Mr. Williams whether he was carrying any contraband or large amounts of cash to which he stated that he was not. The officer then asked if he could search the car and Mr. Williams refused. At that point, the officer informed Mr. Williams that he would detain him there until a canine unit could come and sniff the outside of the car. At around 2:30 p.m., approximately fifteen minutes after the initial stop, the canine unit arrived and eventually alerted to the trunk area of the vehicle. After obtaining the keys and opening the trunk, the officer discovered several large bales of marijuana. The officer then placed Mr. Williams under arrest, and, after giving his Miranda rights, questioned him about any other individuals with whom he was traveling. Mr. Williams told the officer that he was traveling with other individuals who were driving a Jeep Cherokee. Another

officer later located the other vehicle at a nearby restaurant and found a walkie-talkie type radio of the same type as that possessed by Mr. Williams in a trash can.

In what it labeled a "close call," the district court found that the officer in this case had sufficient reasonable suspicion to detain Mr. Williams for the canine sniff of the car. The district court was persuaded by the officer's descriptions of Mr. Williams' extreme nervousness. The district court found further that the officer's suspicions stemming from Mr. Williams' possession of the radio and lack of authority to be in possession of the rental car were entitled to deference in light of the officer's experience in detecting criminal activity. Mr. Williams filed a motion to reconsider asserting that a recent case, *United States v. Holt*, 229 F.3d 931 (10th Cir. 2000), *vacated en banc, United States v. Holt*, No. 99-7150, 2001 WL 1013251 (10th Cir. Sept. 5, 2001), required a finding that the questioning of Mr. Williams regarding his travel plans was unconstitutionally beyond the scope of the initial stop. The district court denied the motion, concluding that *Holt* did not affect "routine questions" about travel plans. In the alternative, the district court concluded that the discrepancy in the rental agreement provided a reasonable relationship between the questioning and the scope of the stop.

On appeal, Mr. Williams argues that (1) the questioning of Mr. Williams about travel plans exceeded the scope of the initial stop for speeding, and (2) the officer lacked reasonable suspicion to detain Mr. Williams for fifteen minutes to await the arrival of the canine drug unit.

Discussion

When reviewing the denial of a motion to suppress, we accept the factual findings of the district court unless they are clearly erroneous, *United States v. Hunnicutt*, 135 F.3d 1345, 1348 (10th Cir. 1998), and view the evidence in the light most favorable to the district court's determination. *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000). On appeal, we consider the totality of the circumstances and treat the ultimate determination of reasonableness under the Fourth Amendment as a question of law which we review de novo. *Hunnicutt*, 135 F.3d at 1348.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A traffic stop is a "seizure" within the meaning of the Fourth Amendment, "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). We have held, however, that a routine traffic stop is more analogous to an investigative detention than a custodial arrest. *Hunnicutt*, 135 F.3d at 1348. "We therefore analyze such stops under the principles developed for investigative detentions set forth in *Terry v. Ohio*, 392 U.S. 1 (1968)." *See id.* To determine the reasonableness of an investigative detention, we make a dual inquiry, asking first "whether the officer's action was justified at its inception," and second "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20.

I. Scope of Questioning

Mr. Williams does not question the validity of the initial stop for speeding, so only the second prong of *Terry* – whether the officer's actions were reasonably related in scope to the stop – is at issue in this case. Mr. Williams argues here, as he did before the district court in a motion to reconsider, that the panel decision in *United States v. Holt*, 229 F.3d 931 (10th Cir. 2000), requires us to rule that the officer's questioning regarding Mr. Williams' travel plans were beyond the scope of the initial stop for speeding. That decision, however, has since been vacated after a rehearing en banc. *See United States v. Holt*, No. 99-7150, 2001 WL 1013251, at *1 (10th Cir. Sept. 5, 2001), *vacating* 229 F.3d 931 (10th Cir. 2000) [hereinafter "*Holt II*"].

Holt II stands for the proposition that a "traffic stop based on probable cause must be judged by examining both the length of the detention and the manner in which it is carried out." *Holt II*, 2001 WL 1013251, at *13. Mr. Williams does not argue that the questioning in this case increased the duration of the stop, but claims that questions related to his travel plans were beyond the scope of the stop and thus unreasonable even after *Holt II*. We are not persuaded, however, that in this case the questioning was outside the scope of the stop. When directly confronted with the issue, we have repeatedly held (as have other circuits) that questions relating to a driver's travel plans ordinarily fall within the scope of a traffic stop. *See West*, 219 F.3d at 1176 (stating that "questions about travel plans are routine and 'may be asked as a matter of course without exceeding the proper scope of a traffic stop' ") (quoting *United States v. Hernandez*, 93 F.3d 1493,

1499 (10th Cir. 1996)); *see also United States v. Santana-Garcia*, No. 00-4087, 2001 WL 1012086, at *3 (10th Cir. Sept. 5, 2001) (quoting *West*, 219 F.3d at 1176); *United States v. Rivera*, 867 F.2d 1261, 1263 (10th Cir. 1989); *United States v. Hill*, 195 F.3d 258, 268 (6th Cir. 1999), *cert. denied*, 528 U.S. 1176 (2000); *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 647 (8th Cir. 1999), *cert. denied*, 528 U.S. 1161 (2000). Though such questions do typically fall within the scope of a traffic stop, citizens' legitimate privacy interests are protected in that they are not legally obligated to answer such questions, nor can an officer compel an answer to these routine questions. *See $404,905.00*, 182 F.3d at 647 n.2 (citing *Terry*, 392 U.S. at 34 (White, J., concurring)). In addition, a motorist's refusal to answer routine questions may not furnish a basis for arrest, "although it may alert the officer to the need for continued observation." *Terry*, 392 U.S. at 34 (White, J., concurring).

Mr. Williams' argument that the questions related to travel plans were outside the scope of the stop also fails because the circumstances that developed placed the questioning within the scope of the stop. By the time the officer began this line of questioning, he already knew that the car was a rental due to his having obtained the rental agreement. While the record indicates that the officer did not yet know of the inconsistent name on the rental agreement at the time he asked about travel plans, it was reasonably within the scope of the stop to ask such questions as the officer began the process of verifying whether Mr. Williams had lawful possession of the vehicle. *See Hunnicutt*, 135 F.3d at 1349 (further questioning

justified where the driver had no proof of legal ownership). Additionally, the officer had already observed Mr. Williams' extreme nervousness and the short-range radio on the passenger seat, two factors that, as discussed *infra*, contributed substantially to raising the officer's suspicions. We conclude, therefore, that the officer's questioning regarding Mr. Williams' travel plans was within the scope of the traffic stop.

II. Reasonable Suspicion

Mr. Williams next asserts that the officer had no specific, articulable facts sufficient to provide reasonable suspicion for the detention while awaiting the arrival of the canine drug unit. During a routine traffic stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation. *Hunnicutt*, 135 F.3d at 1349 (internal citation omitted). In the absence of the particular individual's valid consent, an officer may expand an investigative detention only if there exists an "objectively reasonable and articulable suspicion" that criminal activity has occurred or is occurring. *Id.* This case does not present a question as to whether Mr. Williams gave the officer consent to the detention, as he clearly did not. As a result, we must determine whether sufficient reasonable suspicion existed to support the detention of Mr. Williams beyond the time required for the initial stop. *See United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997).

In his brief, Mr. Williams attempts to distill our analysis in an effort to discount each of the individual factors relied upon by the district court. We consider it worth

repeating that our analysis of whether an investigative detention is supported by an objectively reasonable suspicion of illegal activity turns on our review of the totality of the circumstances. *United States v. Jones*, 44 F.3d 860, 872 (10th Cir. 1995). In doing so, we "judge the officer's conduct in light of common sense and ordinary human experience," *United States v. Mendez*, 118 F.3d 1426, 1431 (10th Cir. 1997), and we accord deference to an officer's ability to distinguish between innocent and suspicious actions. *Wood*, 106 F.3d at 946. Reasonable suspicion, however, may not be derived from inchoate suspicions and unparticularized hunches. *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

From the time the officer indicated that Mr. Williams was free to go to the arrival of the canine drug unit, the only significant event was Mr. Williams' refusal to allow the officer to search the rental car. From the outset, we recognize that "consideration of such a refusal would violate the Fourth Amendment." *Wood*, 106 F.3d at 946. Thus, our analysis turns on whether sufficient and specific articulable facts existed which, when considered together, provided the officer with reasonable suspicion of criminal activity before he asked for consent to search the vehicle.

Mr. Williams contends that the district court impermissibly relied upon the officer's observations of Mr. Williams' nervousness as a basis for finding that reasonable suspicion existed. The district court found that the "specific and detailed testimony" of the officer regarding Mr. Williams' trembling hands, shaky voice, and twitching lip displayed "uncommon and extreme" nervousness. We have held consistently that nervousness is "of limited

significance" in determining whether reasonable suspicion exists. *See United States v. Wald*, 216 F.3d 1222, 1227 (10th Cir. 2000). Extreme and continued nervousness, however, "is entitled to somewhat more weight." *United States v. West*, 219 F.3d 1171, 1179 (10th Cir. 2000). Mr. Williams points to *Wood*, where the panel concluded that the officer's testimony as to the defendant's rapid breathing, trembling hands, and throat-clearing constituted a mere "generic claim of nervousness," and therefore discounted the nervousness as a factor in its reasonable suspicion analysis. 106 F.3d at 948. In *Wood*, however, the officer and the defendant engaged in casual conversation, including a discussion of the good rate the defendant had received on the rental car. *Id.* at 944. Thus, *Wood* appears to have involved the more common situation where a citizen exhibits initially "signs of nervousness when confronted by a law officer," *id.* at 948, but then tends to "settle down" as the traffic stop continues. *See West*, 219 F.3d at 1179.

In this case, the district court found credible the officer's testimony that Mr. Williams' extreme nervousness did not dissipate throughout the entire stop. Given our standard of review, the record supports the district court's finding that Mr. Williams' nervousness exceeded that of the average citizen during a routine traffic stop. While we do recognize that "[n]ervousness alone cannot support reasonable suspicion of criminal activity," *United States v. Salzano*, 158 F.3d 1107, 1113 (10th Cir. 1998) (citing *United States v. Fernandez*, 18 F.3d 874, 880 (10th Cir. 1994)), we see no reason in this case to ignore Mr. Williams' nervousness in reviewing the totality of the circumstances. *See West*, 219 F.3d at 1179.

Mr. Williams also contends that the presence of a two-way, short-range radio was too innocuous to provide any support for a finding of reasonable suspicion. The district court found that the officer knew from experience that cars traveling in tandem and transporting drugs sometimes used such radios to avoid detection by law enforcement personnel. Although, as pointed out by Mr. Williams in his brief, there are numerous legitimate uses for these types of radios, all of these uses generally involve a link to someone else in close proximity. Thus, the officer could have reasonably inferred that Mr. Williams was using the radio to communicate with individuals in a second vehicle. Coupled with this inference are the officer's training and experience that provided him with the knowledge of how drug traffickers use such devices while driving in tandem. *See, e.g., United States v. Inocencio*, 40 F.3d 716, 723 n.9 (5th Cir. 1994) (describing the use of two-way radios by drug smugglers). Finally, Mr. Williams' description of his travel plans to the officer were inconsistent with a need for having such a radio on the front passenger seat. While motorists might possess some items that must be "outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous," *Wood*, 106 F.3d at 946 (internal quotation omitted), such as a cellphone, we find that, in conjunction with the other factors and when giving appropriate deference to a trained officer's ability to "distinguish between innocent and suspicious circumstances," *United States v. Mendez*, 118 F.3d 1426, 1431 (10th Cir. 1997), the radio in this case contributed substantially to the officer's suspicion that criminal activity was afoot.

The district court found that Mr. Williams' possession of the rental car without being named in the rental agreement "contributed, to some degree" to a finding that reasonable suspicion existed. The district court also relied on the fact that the officer knew from experience that drug couriers often use a third-party rental car. In addition, the district court found it significant that the car had been rented in Phoenix, a city that the officer knew from training and experience to be "a source city for distribution of marijuana." *Id.* at 60. Again attempting to turn our totality of circumstances review into a form of elemental analysis, Mr. Williams claims these factors could not give rise to reasonable suspicion.

Although we have stated that "the inability to offer proof of ownership or authorization to operate the vehicle has figured prominently in many of our cases upholding further questioning," *United States v. Hunnicutt*, 135 F.3d 1345, 1349 (10th Cir. 1998), that language typically refers to situations where the inability to show ownership of, or, authorization to drive the vehicle gives rise to an "objectively reasonable suspicion that the vehicle may be stolen." *United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994). The officer in this case asked one question relating to the name "Steve Snobl" on the rental agreement and was told by Mr. Williams that the individual was his uncle who had rented the car in Phoenix. The remaining questions, as well as the subsequent detention of Mr. Williams, focused on whether Mr. Williams was carrying drugs in his car. Thus, although the discrepancy provided the officer with justification to detain Mr. Williams for the purpose of determining whether he was in lawful possession of the car, detention for the purpose of

the canine drug sniff was justified only if the officer had reasonable suspicion that Mr. Williams was transporting drugs. *See United States v. Jones*, 44 F.3d 860, 872 (10th Cir. 1995) (questions regarding contraband that were concurrent with a legitimate detention were justified only on reasonable suspicion of drug activity); *see also Holt II*, 2001 WL 1013251 at *12 (noting that investigations of traffic violations " 'are circumscribed by *Terry's* scope requirement' ") (quoting *United States v. Botero-Ospina*, 71 F.3d 783, 788 (10th Cir. 1995)). But there are other contributing factors related to the discrepancy in the rental agreement that alerted the officer to the possibility of drug activity.

The officer knew from his training and experience that drug couriers often use third-party rental cars. *See, e.g., United States v. Figueroa-Lopez*, 125 F.3d 1241, 1244 (9th Cir. 1997) (expert testimony that use of a rental car was consistent with the practices of an experienced drug trafficker); *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir. 1996) (testimony of officer describing drug courier practices). The fact that the vehicle had been rented in Phoenix also raised the officer's suspicions because, based on his training and experience, he knew Phoenix to be a "staging area for marijuana to be stored until it's ready to move east in the United States." Standing alone, a vehicle that hails from a purported known drug source area is, at best, a weak factor in finding suspicion of criminal activity. In this Circuit alone, police testimony has identified an extremely broad range of known "drug source areas." *See, e.g., United States v. Nicholson*, 144 F.3d 632, 638 (10th Cir. 1998) (identifying the entire West Coast as a drug source area); *United States v. Scarborough*, 128

F.3d 1373, 1378 (10th Cir. 1997) (Colorado); *Wood*, 106 F.3d at 947 (California); *United States v. Garrett*, 47 F. Supp. 2d 1257, 1265 (D. Kan. 1999) (Texas); *see also United States v. Beck*, 140 F.3d 1129, 1138 & n.3 (8th Cir. 1998) (collecting cases and noting that law enforcement officers have identified a number of drug supply states and a significant number of the largest cities in the United States as "drug source cities").

In this case, however, Mr. Williams provided an explanation of his travel plans that indicated he was coming from Denver, Colorado. Though the explanation may have been facially plausible, we cannot brush aside the officer's suspicion that arose when he compared the actual source city of the rental vehicle to the city that Mr. Williams had identified as his point of departure. We have stated that answers to questions suggesting an individual is concealing the fact that he had rented a car in a known drug source area can "give rise to suspicion." *Wood*, 106 F.3d at 947; *see also United States v. Salzano*, 158 F.3d 1107, 1114 (10th Cir. 1998). While in many cases these factors might arise through innocent activity, "officers need not close their eyes to suspicious circumstances." *Hunnicutt*, 135 F.3d at 1349.

After reviewing the rental agreement, observing the family band radio, noting Mr. Williams' nervousness, and obtaining an explanation of Mr. Williams' travel plans, the officer nonetheless told Mr. Williams that he was free to go. Mr. Williams seems to suggest in his brief that this act on the part of the officer nullified any of the suspicion that developed throughout the stop. We disagree.

The significance of an officer returning a driver's license and registration (or rental agreement) assumes paramount importance when we analyze whether an encounter between a citizen and a law enforcement officer is consensual. *See, e.g., United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000); *United States v. Hernandez*, 93 F.3d 1493, 1499 (10th Cir. 1996). While we have developed a bright line in these cases, *United States v. McKneely*, 6 F.3d 1447, 1451 (10th Cir.1993), Mr. Williams fails to cite any case, nor can we find any, suggesting that the return of such documentation negates an officer's objectively reasonable suspicions developed during a traffic stop. Although the record indicates that the officer subjectively intended that Mr. Williams was free to go, the relevant inquiry in this case is based on the objective facts known to the officer, not upon the officer's subjective state of mind. *See Whren v. United States* , 517 U.S. 806, 813 (1996); *United States v. Sanchez*, 89 F.3d 715, 718 (10th Cir. 1996). Analytically, the only problem the release of Mr. Williams creates is that it suggests ostensibly that the officer based his detention of Mr. Williams solely on his refusal to consent to the officer's request to search the vehicle. If true, this, of course, would result in an unconstitutional search. *Wood*, 106 F.3d at 946. But the facts of this case indicate that this is not true. Whether the officer never intended to release Mr. Williams or whether he simply changed his mind after the consensual questioning does not alter our analysis if the officer already had sufficient reasonable suspicion to detain Mr. Williams for the purpose of the canine drug search. We therefore conclude that the officer's indication to Mr. Williams that he was free to leave bears no significance in our determination of

whether the officer had reasonable suspicion to detain Mr. Williams.

Finally, Mr. Williams also mentions in his brief that the presence of a single green duffle bag and several cigarette packs could not be suspicious. Though we may agree with these arguments, we note that the district court did not rely on these factors in its denial of the motion to suppress. Nor did it need to rely on these factors. Under the totality of the circumstances, we conclude that Mr. Williams' extreme nervousness, the presence of the short-range radio, and the discrepancy in the rental agreement all provided the officer with sufficient reasonable suspicion to detain Mr. Williams for the purpose of performing a canine drug search. *See United States v. Kopp*, 45 F.3d 1450, 1453-54 (10th Cir. 1995); *United States v. Morales-Zamora*, 914 F.2d 200, 203 (10th Cir. 1990). Further, approximately fifteen minutes elapsed from the time of the initial stop to the time that the drug detection dog arrived. In the presence of reasonable suspicion of drug activity, this period of detention was not unreasonable. *See United States v. Villa-Chaparro*, 115 F.3d 797, 802-03 (10th Cir. 1997) (finding forty-three minute wait reasonable in view of officer's reasonable suspicion).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff, v. DALLAS WILLIAMS, Defendant.	)	No. 00-10068-01-WEB

Memorandum and Order

(Filed Aug. 17, 2000)

This matter came before the court on the defendant's motion to suppress evidence. The court held an evidentiary hearing on the motion on August 14, 2000, and took the matter under advisement at the conclusion of the hearing. For the reasons set forth herein, the court finds that the motion should be denied.

I. Facts.

The court makes the following findings of fact from the evidence presented. On April 22, 2000, Kansas Highway Patrol Trooper Mitch Nollette was patrolling on Interstate 70 in Thomas County, Kansas, when his radar clocked a white Lincoln Towncar going 76 miles per hour in a 70 mile per hour speed zone. Nollette, who was headed west, turned his car around and made a traffic stop of the eastbound Lincoln. The Lincoln had Arizona license plates. The stop was made at approximately 2:15 p.m.

Nollette approached the car and talked to the driver, defendant Dallas Williams. Williams was the only one in the car. Nollette explained the reason for the stop and asked to see Williams' license and registration. Williams produced an Illinois driver's license and a rental agreement for the car. Nollette noticed that Williams was very nervous. Williams' hand was shaking, his voice was shaking, and his upper lip twitched. Nollette considered Williams' nervousness to be exceptional and extreme as compared to other drivers he had stopped.[1] Williams' nervousness did not dissipate during the stop. Nollette could see a "walkie-talkie" type radio on the front passenger seat. Nollette was somewhat familiar with this type of radio and was aware that it had an effective range of 1 to 2 miles. Nollette also saw several packages of cigarettes. He saw a duffel bag behind the driver's seat.

Nollette had some conversation with Williams about his travel plans. Williams said he was traveling from Denver to Kansas City to pick up his sister, and that the two of them then planned to drive back to Denver for a family Easter gathering. (This stop occurred on Saturday, April 22nd. The following day was Easter Sunday.) Williams said his sister was from Chicago and that she had traveled with a friend from Chicago to Kansas City. He said his sister did not like to fly.

Nollette returned to his car and performed a routine check on Williams' driver's license. The check showed that the license was valid. Nollette also read the rental

---

[1] On cross-examination Trooper Nollette conceded that his characterization of Williams as showing "I might be going to jail nervousness" was speculative.

agreement provided by Williams. It showed that the car had been rented under the name of "Steve Snobl" in Phoenix and that the defendant was not listed on the agreement. At some point during the stop, Nollette asked Williams about Snobl. Williams said that Snobl was his uncle, and that Snobl had rented the car in Phoenix in order to drive to the family gathering in Denver. He said that Snobl let him borrow the car to go to Kansas City to get Williams' sister.

Nollette testified that he has seen several prior cases where individuals transporting drugs had traveled in tandem with another car. In such cases, he said, the driver of a "lead car" would use a CB radio or other communication device to warn the driver of a second car loaded with drugs that the Highway Patrol was in the area. Nollette testified he was suspicious that Williams was traveling with another vehicle. Nollette testified that based on his training, he knew Phoenix to be a staging area for the shipment of marijuana to other parts of the country. Nollette also testified that it was common in drug cases for someone other than the authorized person to be in possession of a rental car. Nollette also testified that he was suspicious of the defendant's explanation of his travel.

After he had completed the check on the defendant's license and had talked to him, Nollette returned the license and rental papers to Williams. Nollette said something to the effect of, "Thanks a lot. We'll see you." He intended by this to indicate to Williams he was free to leave. Nollette then asked Williams if he would mind answering a few questions. Williams said "sure," indicating he would not mind. Nollette asked Williams if he

were carrying any contraband or large amounts of cash. Williams said he was not. Nollette then asked if he could search the car. Williams said no. At that point, Nollette told Williams that he was going to be detained until a drug-detecting dog could be brought to the scene.

Nollette made a radio call requesting a drug-detection dog. A Thomas County Sheriff's Deputy arrived with a dog shortly thereafter, at approximately 2:30 p.m. The dog and his handler had previously been trained in the detection of marijuana through successful completion of a training course run by the Sarasota County (Florida) Sheriff's Department. When the dog was taken near the trunk of the car, the dog gave a strong "alert," raising up and scratching with both paws. Nollette obtained the keys to the trunk of the car and opened it. He found several large packages of marijuana in the trunk.

Williams was arrested and given his Miranda rights. The defendant waived his rights and made a statement to the Trooper. Williams told the Trooper that he was traveling with other individuals who were in a Jeep Cherokee. Officers were later able to find the occupants of the Jeep at a restaurant near I-70, and also found in the trash at that location a walkie-talkie radio of the same type possessed by the defendant.

II. Arguments.

The defendant contends that the trooper lacked reasonable suspicion to justify a continued detention of the defendant after a warning ticket was issued and after Williams refused to give permission to search the car. The defendant contends this subsequent detention (of both

his person and the car) was not supported by reasonable suspicion of criminal activity or by voluntary consent and was therefore an unreasonable seizure under the Fourth Amendment. He further contends that the discovery of the marijuana in the trunk was a product of the unlawful detention and must therefore be suppressed.

In response, the government argues the defendant has no standing to challenge the search because he has not shown he had lawful possession of the car at the time of the search. The government concedes, however, that the defendant has standing to challenge the detention of his person.[2] Furthermore, the government contends that the initial stop was justified because the defendant was speeding, and that the subsequent detention was justified because the officer had a reasonable suspicion that the defendant was transporting contraband.

---

[2] Because the defendant presented no evidence at the suppression hearing that he was in lawful possession of the vehicle, the court agrees with the government that the defendant cannot complain that the search of the car violated his Fourth Amendment rights. *See United States v. Soto*, 988 F.2d 1548, 1552 (10th Cir. 1993). Nevertheless, the defendant clearly has standing to challenge the seizure of his person, and the government has proffered no basis for concluding that the discovery of the marijuana in this case was independent of the defendant's detention. Accordingly, the court will determine if the detention of the defendant was reasonable under the Fourth Amendment.

III. Discussion.

The decision to stop an automobile is reasonable under the Fourth Amendment when the officer has probable cause to believe a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806, 810 (1996). Based on the testimony of the trooper, which the court finds credible, the court concludes that the officer had probable cause to stop the defendant for speeding. The court thus finds that the initial stop of the defendant was lawful.

During a routine traffic stop, a police officer may request a driver's license and registration, run a computer check, and issue a citation. The officer may also inquire about travel plans. *See United States v. Hernandez*, 93 F.3d 1493, 1498-99 (10th Cir. 1996). The Trooper did these things in the instant case and there was nothing improper about his doing so. Once the initial purpose of a stop is effectuated, the driver must be permitted to proceed on his way unless the officer has a reasonable suspicion of other criminal activity or the driver voluntarily consents to further questioning. *Id.* at 1498. In this case, the evidence shows that after Trooper Nollette indicated to Williams that he was free to leave, Williams initially agreed to answer some additional questions. When Williams refused to grant permission to search the car, however, Nollette told him he would be detained until a dog could be brought to the scene. This was clearly a seizure of the defendant for investigative purposes. The reasonableness of such a seizure turns on whether the trooper had a reasonable suspicion of criminal activity, based upon specific and articulable facts, such that it warranted the intrusion on William's security, and whether the scope and duration of that detention were

carefully tailored to the underlying justification. *See Florida v. Royer,* 460 U.S. 491, 500 (1983).

The court concludes that the facts known to the trooper at the time of the detention gave rise to a reasonable suspicion that the defendant may have been involved in criminal activity, such that it warranted a brief investigative detention. First, the rental agreement showed that the defendant was not entitled to possession of the rental car. Based upon his experience, Trooper Nollette knew it was common in drug cases for someone other than the authorized person to be in possession of a rental car. Additionally, Nollette knew from training or experience that Phoenix was a source city for distribution of marijuana. Although William's explanation that the car was loaned to him by his uncle was not inherently implausible, Williams provided no proof of that assertion. Under the circumstances, Williams' unauthorized possession of the car contributed, to some degree, to a reasonable suspicion of criminal activity. *Cf. United States v. Arango,* 912 F.2d 441, 446 (10th Cir. 1990); *United States v. Obregon,* 748 F.2d 1371, 1376 (10th Cir. 1984).

Second, the presence of the short range, two-way radio on the front seat reasonably supported Nollette's suspicion that Williams was traveling in tandem with another car. Although such radios have numerous lawful purposes, the presence of a single radio on the front seat next to Williams while he was driving on the interstate implied recent use of the radio and reasonably gave rise to a suspicion that Williams was traveling with another car. Furthermore, travel with another vehicle reasonably appeared to the trooper to be inconsistent with Williams' explanation of his travel. Additionally, Nollette knew

from experience that cars traveling in tandem and transporting drugs sometimes used devices such as the two-way radio to attempt to avoid detection by law enforcement officers. When considered together with the [sic] all of the other factors listed herein, the presence of the radio in this case contributes toward a finding of reasonable suspicion of criminal activity.

Third, although nervousness is of limited significance because most people exhibit signs of nervousness when stopped by law enforcement officers, the court is persuaded from the specific and detailed testimony of the trooper that the display of nervousness by Williams throughout the stop – including shaking hands, shaking voice, and twitching lip – was uncommon and extreme as compared to most motorists stopped for speeding. Under the circumstances, this nervousness weighs somewhat in favor of a finding of reasonable suspicion. *See United States v. West*, 2000 WL 985929, *6 (10th Cir., July 18, 2000) (extreme and continued nervousness was entitled to some weight).

This case presents a close call. Under the totality of the circumstances, however, the court concludes that the facts known to the officer gave rise to a reasonable suspicion that the defendant may have been involved in transporting drugs. Although there are potentially innocent explanations for the facts observed by the trooper, an officer is entitled to assess the facts in light of his experience in detecting criminal activity. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975). In this case, the officer's judgment that the unauthorized possession of the rental car, the possession of the radio, and the defendant's extreme nervousness were indications of possible

drug trafficking is entitled to deference. The assessment of reasonable suspicion "does not deal with hard certainties, but with probabilities" based upon common sense and ordinary human experience. *See United States v. Cortez*, 449 U.S. 411, 418 (1981). *See also Reid v. Georgia*, 448 U.S. 438, 441 (1980) ("wholly lawful conduct might justify the suspicion that criminal activity was afoot."). Moreover, a brief detention of this type requires only a "minimal level of objective justification" rather than proof of wrongdoing by a preponderance of the evidence. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The court concludes that the detention of the defendant was justified at its inception.

The court also concludes that the officer's subsequent action was reasonably related in scope to the circumstances that warranted the detention. The officer detained the defendant and the car in order to conduct a canine sniff of the outside of the vehicle. The evidence shows that this was done expeditiously and that the dog arrived within 15 minutes of the initial stop. Although the defendant points out that the officer failed to ask him several follow-up questions that might have provided relevant information about the officer's suspicions, the evidence shows that the use of a dog to do a sniff was likely the most expeditious means available to quickly confirm or dispel the officer's suspicions. *Cf. Florida v. Royer*, 460 U.S. 491, 500 (1983). *See also id.* at 506 (noting that a dog sniff, if available, would be an expeditious way to confirm or dispel the officers' suspicion that drugs were in the defendant's luggage). Additionally, a canine sniff of the car's exterior was an especially appropriate means of investigation under the circumstances because it involved

minimal intrusiveness. *See United States v. Hunnicutt*, 135 F.3d 1345, 1350 (1998). *Cf. United States v. Place*, 462 U.S. 696, 707 (1983) ("We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."). In sum, the court concludes that the officer's detention of the defendant to conduct a dog sniff was reasonable under the circumstances. Once the dog alerted to the truck of the car, the officer had probable cause to search the trunk and, upon discovering the marijuana, had probable cause to arrest the defendant.

The defendant argues that reasonable suspicion could not have existed here because Nollette initially told Williams he was free to go, but then decided to detained [sic] him after Williams refused to grant permission to search the car. Def. Rep. at 9. These facts, however, do not negate the existence of reasonable suspicion. It is entirely possible that although Trooper Nollette suspected the defendant of criminal activity, he did not initially believe he had sufficient grounds to support an investigative detention. It is also possible that he may have thought the defendant's subsequent refusal to grant a search could legitimately be considered as a basis for suspecting him of criminal activity. (The latter view, of course, would be contrary to well-established law.).[3] Nevertheless, the critical inquiry under the Fourth Amendment is based upon the objective facts known to the officer, not upon the officer's subjective state of mind. *See Whren v. United*

---

[3] *See e.g., United States v. Wood*, 106 F.3d 942, 996 (10th Cir. 1997).

States, 517 U.S. 806, 813 (1996). *See also United States v. Sanchez*, 89 F.3d 715, 718 (10th Cir. 1996) ("The subjective intentions or state of mind of either the defendant or police is irrelevant to Fourth Amendment analysis."). Thus, even if Trooper Nollette erroneously thought that Williams' refusal provided a legitimate basis for a detention, that would not affect the lawfulness of the detention because the other facts known to the officer were sufficient to warrant a reasonable suspicion of criminal activity. *Cf. Hunnicutt*, 135 F.3d at 1351-52 (officer's consideration of the fact that the defendant refused to consent to a search was immaterial because other factors supported reasonable suspicion). Similarly, the fact that Nollette changed his mind about letting the defendant go is inconsequential because at the time of the seizure the facts known to Nollette provided an objectively reasonable basis for a brief detention.

IV. Conclusion.

The court finds that the trooper's detention of the defendant and the search of the car were reasonable under the Fourth Amendment. Accordingly, the defendant's motion to suppress evidence (Doc. 21) is hereby DENIED. IT IS SO ORDERED this 17th Day of August, 2000, at Wichita, Ks.

/s/ Wesley E. Brown
Wesley E. Brown,
U.S. Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)	No. 00-10068-01-WEB
v.	)	
DALLAS WILLIAMS, Defendant.	)	

Memorandum and Order

(Filed Nov. 13, 2000)

This matter came before the court on the following motions filed by the defendant: Motion for Reconsideration (Doc. 32); Motion for Downward Departure (Doc. 36); and Motion to Remain on Bond Pending Appeal (Doc. 37). The court ruled orally on the motions at the sentencing hearing of November 13, 2000. This written memorandum will supplement the court's oral rulings.

1. ***Motion to Reconsider*** – The defendant argues that the Tenth Circuit's ruling in *United States v. Holt*, 229 F.3d 931 (10th Cir. 2000), as applied to this case, requires a finding that the trooper's questions about the defendant's travel plans were unlawful because those questions exceeded the legitimate reason for the traffic stop.

The *Holt* case held only that officers may not ask questions unrelated to the purpose of the stop if the questions call for an incriminating response. Specifically, the court said that questions about weapons or contraband during a routine traffic stop must be supported by

reasonable suspicion. The court did not overrule prior Tenth Circuit decisions stating that "questions about travel plans are routine and 'may be asked as a matter of course without exceeding the proper scope of a traffic stop.' " *See United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000). The questions that the defendant was asked by the Trooper in this case were routine questions about his travel plans. They were questions that a traveler would expect as a part of ordinary conversation, and were not incriminating in nature. Additionally, given that the rental papers for the car being driven by the defendant showed that it had been rented in Phoenix by some other person and that the defendant was not listed as an authorized driver, the trooper's questions about the defendant's travel plans were reasonably related to a permissible inquiry concerning whether the defendant's possession of the car was lawful.

In sum, the *Holt* case does not change the previous finding that the traffic stop and the search did not violate the defendant's rights. The motion to reconsider is therefore denied.

2. ***Motion for Downward Departure*** – Defendant argues that he should be granted a downward departure because his offense was an aberrant act of criminal behavior. He notes that aberrant behavior is an encouraged factor for departure under the guidelines. He points out that in *United States v. Bennally*, 215 F.3d 1068 (10th Cir. 2000), the court stated that "the permissible factors . . . must illustrate some unique circumstance – some element of abnormal or exceptional behavior – beside the fact that the defendant has never before committed the crime." He also points out that the most recent guideline

amendments include new guidelines for application of this departure, and he argues that he meets the requirements of the new guidelines.

Although the court has discretion to depart in cases of aberrant criminal behavior, the court is not persuaded that the unique circumstances required for a departure are present in this case. The defendant's educational pursuits are commendable, but they do not warrant a departure. The defendant has had two prior convictions, although they were for relatively minor offenses (criminal trespass and a DUI). Contrary to the defendant's arguments, the instant offense involved a significant amount of thought and planning on his part.[1] It was an extended offense involving a cross-country trip. It included the use of two-way radios and traveling in tandem with another vehicle in an effort to avoid detection. Under the circumstances, the court cannot find that the offense constitutes an act of aberrant behavior. Accordingly, the motion for departure is denied.

3. *Motion for Appeal Bond*: The court noted in ruling on the motion to suppress that this is a close case.

---

[1] As defendant points out, an amendment that became effective November 1, 2000, defines "aberrant behavior" as "a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life." USSG § 5K2.20, comment, n. 1 (Effective Nov. 1, 2000). This amendment likely does not apply in this case because it became effective after the defendant's offense conduct. Even if it did apply, the court would still conclude that the defendant's offense does not meet the requirements for aberrant behavior.

Because the motion to suppress presents such a close question, and because there is clear evidence that the defendant is not a flight risk or danger to the community, the court concludes that the defendant should be released on bond pending a ruling by the circuit court on his motion to suppress evidence.

Conclusion. Defendant's Motion for Reconsideration (Doc. 32) is DENIED; Defendant's Motion for Downward Departure (Doc. 36) is DENIED; and Defendant's Motion to Remain on Bond Pending Appeal (Doc. 37) is GRANTED.

Pursuant to 18 U.S.C. § 3143(b), the previous order setting conditions of release and the bond previously executed (with an additional surety now added to the bond) are continued in effect pending a ruling by the circuit court on the defendant's appeal.

IT IS SO ORDERED this 13th day of November, 2000, at Wichita, Ks.

/s/ Wesley E. Brown
Wesley E. Brown, U.S. Senior
District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	
Plaintiff-Appellee,	
v.	**No. 00-3365**
DALLAS WILLIAMS,	
Defendant-Appellant.	

ORDER

Filed December 26, 2001

Before KELLY, ANDERSON, Circuit Judges and **STAGG***, District Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the

---

* The Honorable Tom Stagg, Senior District Judge, United States District Court for the Western District of Louisiana, sitting by designation.

court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

U.S.A.,

Plaintiff,

Case No.
00-10068-01-WEB

vs.

DALLAS WILLIAMS,

Defendant.

TRANSCRIPT OF MOTION TO SUPPRESS

PROCEEDINGS had on the 14th day of August, 2000, in the above-entitled and numbered cause before the HONORABLE WESLEY E. BROWN, Senior Judge of the United States District Court for the District of Kansas, Sitting in Wichita.

APPEARANCES

The Plaintiff appeared by and through Mr. Lanny Welch.

The Defendant appeared in person and through Mr. Dan Monnat and Ms. Anne Ethen.

* * *

[9] Q. What generally speaking what are your duties as a trooper in Colby, Kansas?

A. My primary duty is to patrol mainly the interstate, I-70, and just do regular patrol, law enforcement duties on I-70 and other state highways in the county.

Q. On April 22nd of this year were you employed as a Kansas Highway Patrol trooper?

A. Yes.

Q. And were you on duty that day?

A. Yes.

Q. And at some time during April 22nd, 2000 did you come into contact with a white Lincoln Towncar?

A. Yes.

Q. Where did you come in contact with that vehicle?

A. My first contract was near mile post 59, approximately, I-70.

Q. All right. And what is the posted speed limit on that stretch of I-70?

A. 70 miles per hour.

Q. And why did you first take notice of this vehicle?

A. I checked this vehicle's speed at 76 miles an hour in a 70 zone using my radar unit.

Q. Is that speeding on that highway, on Interstate 70?

A. Yes, it is.

Q. What time did you go on duty that day?

* * *

[11] a traffic stop on it.

Q. And where was it that you stopped the car?

A. Near mile post 60 on I-70 eastbound.

Q. And after the vehicle came to a stop, what did you do?

A. I approached the car on the passenger's side and explained to the driver why I stopped him and asked him to see his driver's license.

Q. How many people were inside the car when you stopped him?

A. Just one.

Q. And the driver, did he present identification to you?

A. Yes. He presented a valid Illinois driver's license.

Q. What was his name?

A. His name was Dallas Williams.

Q. And do you see him in the courtroom today, sir?

A. Yes, I do.

Q. Would you point to him and describe what he's wearing.

A. He's wearing – the one in the middle there. He's got red hair and a goatee and a dark colored coat and a red tie.

Q. When you first began conversing with Mr. Williams on the roadside, what, if anything, did you notice initially?

A. During my initial conversation with him I noticed he [12] was very nervous. When he handed me his driver's license his hand was shaking visibly (indicating) and –

Q. For the record, you've extended out your right hand and showed a trembling motion –

A. Yeah.

Q. – just to demonstrate a shaking hand?

A. And I also noticed that when he spoke to me that his voice was shaking somewhat. And also when I was talking to him or asking a question his upper lip would twitch somewhat.

Q. Now, Trooper Nollette, prior to April 22nd of 2000, have you stopped motorists on the highway?

A. Yes.

Q. And have you seen motorists displaying various levels of nervousness to you during a stop and the conversation you had?

A. Yes.

Q. All right. This nervousness that was displayed by Mr. Williams on April 22nd, 2000, how would you describe it compared to other motorists you've seen before?

A. I would describe his nervousness as probably exceptional or extreme, in comparison to other motorists.

Q. And why do you say that?

A. Well, most motorists, you know, once I get up there, are somewhat nervous because they haven't dealt

with the [13] police very often, everybody's nervous to some degree, but in my opinion there's a speeding ticket nervous and there's also a I may be going to prison type of nervousness.

Q. And –

THE COURT: What was that last statement?

A. I may be going to prison type of nervousness.

Q. Now, you described three different behaviors, for lack of a better word, on the part of Mr. Williams when he was stopped: His hand trembling, his voice shaking and also his upper lip, I believe, you said –

A. Yes, that's correct.

Q. – quivered. The fact that you saw all three of those present in Mr. Williams, was that something that led you to believe he was unusually or exceptionally nervous, to use your word?

A. That's correct.

Q. While this – while you were noticing this behavior from Mr. Williams, and you received his driver's license, what else did you do?

A. I also observed the interior of the car, like I normally do, and I noticed several packs of cigarettes in the front interior of the car along with a blue portable radio, walkie-talkie type radio laying in the front seat and also noticed Williams' duffle bag, green duffle bag in [14] the back seat area of the car behind Williams.

Q. The fact that you saw a lot of cigarette wrappers in the car –

A. To me that denotes possibly trying to hide nervousness by smoking cigarettes. That's something I've seen before.

Q. All right. And the radio that you described, what type of radio was that?

A. It's – it was blue in color, and it's probably (indicating) four to six inches in height and it's a type used usually within one or two miles. It's got – it's only got a range of one to two miles.

Q. Sir, I'm going to hand you what's been marked as – two photographs marked Government's Exhibits 1 and 3 and ask if you would to [sic] take a look at those and tell me if you know what those are.

A. A picture of the vehicle the suspect was driving at the time of the stop, white Lincoln Towncar.

Q. I'm sorry. Which exhibit is that?

A. It's Number 1.

Q. Is that a photograph of the way the Lincoln Towncar appeared the day that you stopped it?

A. Yes, this was taken on that day.

Q. All right. And Government Exhibit Number 3, what is that?

* * *

[17] question before the Court.

MR. WELCH: It will be relevant, Your Honor, as to one issue, which we'll get to here shortly, if I may.

THE COURT: All right. I'll permit it for the purpose of this hearing.

MR. WELCH: All right.

Q. Did you answer the question, sir?

A. No. Could you repeat the question?

Q. Certainly. Did your investigation or the investigation of law enforcement that day reveal that Mr. Williams was traveling in tandem with another car on I-70?

A. Yes.

Q. And how was that determined?

A. I questioned Williams after I'd made the discovery of the marijuana.

Q. And he admitted that to you?

A. Yes. I grabbed the radio out of his car and held it up and said, who are you traveling with? And then he explained to me who he was traveling with and what vehicle.

Q. But this is after he'd already been placed under arrest?

A. Correct.

[18] Q. All right. Let's go back to where we were before and talk about your dealing with Mr. Williams initially. After you noticed the cigarette wrappers and the radio and a back pack in the back seat of the car –

A. A duffle bag, yes.

Q. – what happened?

A. I also obtained the rental agreement from the vehicle Williams was driving and went back to my patrol car. And at that time I did a routine driver's license check on Williams to make sure his license was valid, which it was. And I also read over the rental agreement that Williams gave me for the car.

Q. And what, if anything, did you take notice of regarding the rental agreement?

A. On the rental agreement I noticed a person by the name of Steve Snobl had rented the vehicle, and I also noticed that Williams' name was not on the agreement anywhere.

Q. Did that cause you any concern?

A. Yes. And also the fact that the car was rented in Phoenix, Arizona.

THE COURT: Car was what?

A. Rented in Phoenix, Arizona.

THE COURT: Okay.

Q. The fact that Mr. Williams' name was not on the [19] agreement, what, if anything, did that mean to you or indicate to you at that time?

A. It showed me that Williams really didn't belong in the vehicle, for the first thing, and it's a thing I see fairly often in this type of a case.

Q. What type –

A. Where a third party has rented the vehicle and has had somebody else drive the vehicle where the renter is not present.

Q. When you say this type of case, what are you talking about?

A. Sizeable drug seizure.

Q. All right. And you also testified or made note of the fact that the car was rented in Phoenix, Arizona. Why did you take note of that?

A. Based on my training and experience, Phoenix, Arizona is known as a staging area for marijuana to be stored until it's ready to move east in the United States.

Q. Trooper Nollette, I'm going to hand you what's been marked as Government's Exhibit 4 and 5, and if you would, as you did with the photographs, tell me in detail what those are.

A. Exhibit Number 4 is a copy of the rental agreement that Williams handed me that day, and Number 5 is extra documentation found within the pamphlet with the rental [20] agreement.

Q. So all of the documents except for the copy of the documents you have in your hand now were all contained in a pamphlet?

A. Yes.

Q. Did – do the photocopies that you have in front of you now appear to be fair and accurate copies of the originals that you found April 22nd, 2000?

A. Yes.

MR. WELCH: We would offer Exhibits 4 and 5, Your Honor.

MR. MONNAT: No objection for purposes of this hearing, Your Honor.

THE COURT: Be admitted. That's all we're talking about is this hearing, so you won't have to say for the purpose of this hearing each time. Go ahead.

Q. Trooper Nollette, the documentation which appears on 4 and 5, does the name Dallas Williams appear anywhere on any of those rental agreements?

A. No, sir.

Q. Let me ask you also: You've already testified quite a bit about various – several nervous habits displayed by Mr. Williams when you first made contact with him. Did that level of nervousness dissipate during the stop?

A. No, sir.

[21] Q. All right. After you looked at the rental agreement, what happened, sir?

A. I returned to Williams and handed him back his rental agreement and his license, then I also gave him his written warning that I just completed for the speeding and also explained to him what it meant and everything.

Q. Did you ask him what the purpose of his travel was?

A. Yes.

Q. What did he say?

A. He said that he was traveling from Denver to Kansas City to pick up his sister in Kansas City, who was

from Chicago. He said his sister had traveled from Chicago to Kansas City with a friend and he was going to pick her up.

Q. Did he tell you how he had gotten possession of the car that he was driving?

A. He said that he borrowed the car from Mr. Snobl in Denver. I believe he said Mr. Snobl was his uncle.

Q. Did he tell you where Mr. Snobl rented the car from? Did you ask?

A. I don't believe I asked that question.

Q. Was there anything else about his purpose of travel that you took note of?

A. Not really. That's pretty much what we discussed.

Q. Did anything seem strange or unusual to you?

A. Yes, the fact that he didn't have his name on the [22] rental agreement and he was simply borrowing the car, and I didn't understand why his sister couldn't have driven on to Kansas City – or flown from Chicago to Denver and why he had to go from Denver to Kansas City to pick her up. That was kind of a strange situation.

Q. When he said she lived in Chicago but was picking her up in Kansas City?

A. Yeah.

Q. Is that what you're saying?

A. Correct.

Q. Before he was arrested did Mr. Williams tell you that he was traveling in tandem with another vehicle?

A. Not prior to the arrest, no.

Q. Did he ever explain the purpose of having the blue radio in his vehicle –

A. No, sir.

Q. – before he was arrested?

A. No, sir.

Q. After he told you why he was traveling and where he was going, what happened?

A. I then – let's see. Yeah, then told him – let's see. I said, well, thanks a lot, and we'll see you, in the – in an effort to release him, told him he was – you know, said, we'll see you, and that's all I had for him.

Q. Let me – I'm sorry. Back up one second. Did you [23] ask where Steve Snobl was at the time you were dealing with Mr. Williams on I-70?

A. I didn't ask where he was, no.

Q. Go ahead. I'm sorry.

A. Review my narrative here. I think I pretty much answered the question.

Q. All right. You may have testified to this. Again I apologize. You said you issued – you wrote out a warning ticket for the speeding, right?

A. Correct.

Q. And you returned both the ticket and his documentation, license, et cetera.

A. Correct.

Q. Everything's back to Mr. Williams.

A. Correct.

Q. And after you gave him all his paperwork back, what did you say to him, if anything?

A. I said, thanks a lot, we'll see you. That's usually what I say at the end of a traffic stop.

Q. And after that what happened?

A. I then asked Williams if I could – if he would mind if I asked him a few more questions.

Q. And what did he say?

A. He said sure. I asked Williams if he had anything illegal in the car like drugs or guns or a bunch of cash, [24] and Williams said, no, that he didn't.

Q. What did you do then?

A. I asked him – I then asked Williams if I could search his car.

Q. What happened?

A. He said no.

Q. And after he refused to let you search his car what happened?

A. I explained to him that I was going to detain him at that location until a canine unit could come to our location and sniff the outside of his car, and at that point I went back to my car and called for the canine unit.

Q. All right. Did a canine unit arrive at the scene?

A. Yes.

Q. What time did the canine unit arrive?

A. I have here 1430 hours.

Q. And I'm sorry, tell me again what time the stop was.

A. It was at 1415.

Q. 1415?

A. Yes.

Q. So approximately 15 minutes after the stop the canine unit arrived.

A. Correct.

Q. Do you know who it was from the Thomas County [25] sheriff's department that arrived?

A. Yes. His name is Ken Patton, Deputy.

Q. Have you worked with Mr. Patton before, the canine handler?

A. Yes.

Q. After Mr. Patton arrived, what happened?

A. Patton worked his dog around the vehicle and eventually Patton told me that the dog indicated on the trunk of the vehicle, trunk area of the vehicle.

Q. After the dog alerted to the vehicle, what happened next?

A. I went to – I retrieved the keys from the ignition of the car and opened up the trunk and discovered several large bales of marijuana.

Q. Did you place Mr. Williams under arrest at that time?

A. Yes.

Q. After he was arrested you've already testified that you had some conversation with Mr. Williams, is that right?

A. Yes.

Q. At some point in time did you advise Mr. Williams of his Miranda rights?

A. Yes. At 1435 hours I read his Miranda rights to him.

Q. How did you do that?

A. It was on the roadside. I have a card in my pocket.

* * *

[31] A. Yes.

Q. And in this case, the offense/arrest-narrative you made, you didn't make any statements in it that were false, did you?

A. Not to my knowledge, no. To the best of my knowledge, everything is true.

Q. Just a couple questions. When you were talking to Mr. Williams on the roadside, did you make any field notes or notes or recordings of any kind?

A. No.

Q. The first thing you did when you approached the Lincoln on the passenger's side was to explain to the driver why you stopped him, correct?

A. Yes.

Q. And you said the reason you stopped Mr. Williams' car is because it was exceeding the 70 miles per hour speed limit by 6 miles per hour, correct?

A. That's correct.

Q. So when you first approached Mr. Williams, what you said to him was, the reason I stopped you was for traveling 76 miles per hour in a 70-mile per hour zone, right?

A. That's very close.

Q. After you said that, you say Mr. Williams appeared very nervous, correct?

[32] A. You're referring to my narrative?

Q. Yes.

A. Yes.

Q. And before April 22nd of 2000, to your knowledge, you had never seen Mr. Dallas Williams, correct?

A. That's correct.

Q. And before April 22nd of 2000, to your knowledge, you had never heard Mr. Dallas Williams speak, correct?

A. That's correct.

Q. When you stopped Mr. Williams, then, you were unfamiliar with what his usual appearance or demeanor was, right?

A. Correct.

Q. And when you stopped Mr. Williams, you were unfamiliar with his usual manner of speaking, correct?

A. Correct.

Q. You were unfamiliar with his usual degree of steadiness, correct?

A. Correct.

Q. Today, I've heard you describe nervousness as extremely nervous and the I might go to jail kind of nervousness, is that right?

A. Yes.

Q. But at the time you stopped Mr. Dallas Williams, you didn't know how nervous or shaky Dallas Williams usually [33] was, did you?

A. No.

Q. At the time of the stop you didn't know how long Dallas Williams had been driving on the road, did you?

A. No.

Q. At the time of the stop – well, you didn't know if Dallas Williams was a coffee drinker, did you?

A. No.

Q. At the time of the stop you did see some cigarette packs in the car that caused you to conclude that he was a cigarette smoker.

A. Yes.

Q. And you agree, don't you, that the caffeine in the coffee and the nicotine present in cigarettes often makes people appear shaky because of their stimulant content, don't you?

MR. WELCH: Objection, speculation. Frankly, it's irrelevant to this hearing.

MR. MONNAT: And he's testified about his theories of why he was shaky.

THE COURT: I think he can ask the question. You may answer, if you know.

A. I couldn't say. I'm not a doctor. I couldn't really discuss the effects of alcohol and nicotine on people.

Q. So you don't know what may cause people to appear [34] shaky, other than involvement in criminal activity, is that your testimony?

A. Repeat the question.

Q. Well, you're aware, aren't you, that things can cause people to be shaky or nervous, even though they're innocent of any criminal activity.

A. Yes.

Q. And whether or not that includes caffeine and nicotine, you just don't know. True?

A. Correct.

Q. When you first saw Mr. Williams after stopping him, you didn't know if he suffered any physical disabilities or infirmities, did you?

A. No.

Q. And although – and you didn't ask him if he suffered any physical disabilities or infirmities, did you?

A. No.

Q. At the time of the stop, you didn't ask Mr. Williams if he had consumed any prescriptions or over the counter medications that might make him shaky, did you?

A. No.

Q. And you – do – let me just ask you this: Do you know that, for instance, allergy prescriptions can make people shaky?

A. I didn't realize that.

[35] Q. Do you know that taking No-Doze pills containing caffeine so that you can stay awake longer to drive may make people appear shaky?

MR. WELCH: Your Honor, I'm going to object to this line of questioning as being irrelevant. We could go on forever if he wanted to. I don't think it's relevant to the hearing.

THE COURT: I think he's made his point. He didn't know there were other things. He hasn't mentioned old age yet, but I'll see if that becomes important. It doesn't from the looks of people around that it will. Go ahead, Mr. Monnat.

MR. MONNAT: May he answer just that last question about No-Doze pills, Your Honor?

THE COURT: He already has, I think.

A. I haven't. Would you repeat the question, please.

Q. Okay. At the time you first stopped Mr. Williams, you didn't know that things like No-Doze pills containing caffeine could cause people to be – appear shaky or nervous, did you?

A. No.

Q. And did I hear you just a few moments ago say at the time I stopped Mr. Williams, I didn't know what kinds of things like alcohol or caffeine could make him appear shaky or nervous? Did I hear you say that?

* * *

[38] unless there's some other background as to whether or not the training of the officer is sufficient for him to make the finding he did, which I think is what you're working at.

Q. Let me ask the officer this, Your Honor. Officer, did you find the shakiness or nervousness of Mr. Dallas Williams that you describe as so extreme, so extreme as for you to ask him to step out of the car for your own personal safety?

A. No, I view that as an increase in my danger, if we're both outside the vehicle. It's safer for me to have him stay inside the vehicle.

Q. Did you see his nervousness or shakiness as so extreme that you immediately called for back-up because you were in fear for your personal safety?

A. No.

Q. You didn't fear for your personal safety because of the nervousness and shakiness you saw, did you?

A. No.

Q. I want to go back to when you told Mr. Williams that you stopped him for going 76 in a 70-mile per hour zone. Has it been your experience in life that the more strictly rules are enforced the more pressure people are under to obey the rules?

MR. WELCH: I'll object to that, Your Honor.

* * *

[43] make a motorist nervous to learn that in rural areas of the state of Kansas the law is so strictly enforced that if you're going a mere 6 miles per hour over the speed limit you're going to be stopped, wouldn't you?

A. I couldn't say what people think.

Q. All right.

A. I don't know.

Q. And you would say that about Mr. Williams, too. You can't say what he's thinking, can you?

A. No.

Q. And when you said his nervousness was extreme, you don't know what he was thinking.

A. I don't know what he's thinking, no.

Q. And when you said that his nervousness was more like the I'm afraid I might go to jail nervousness, that was pure speculation on your part about his nervousness.

A. Yes.

Q. Correct?

A. That's just my opinion.

Q. By the way, regarding Mr. Williams' appearance and the sound of his voice, many highway patrol vehicles which make stops on Interstate 70 are equipped with video recording equipment, aren't they?

A. Yes.

Q. And your highway patrol vehicle was equipped with [44] video recording equipment on the day Mr. Williams was stopped, wasn't it?

A. Yes.

Q. The video recording equipment that you had in your car also can record sounds, correct?

A. Yes.

Q. So even though your car was equipped with a video camera on the day in question at the time of this stop going 76 in a 70-mile per hour zone, you chose not to use the video to record the stop, correct?

A. What happened was the tape that was in the – in the unit had come to an end and I just hadn't taken the time to put a new tape in.

Q. So before you got out of your car to go interview Dallas Williams on this 76 in a 70-mile per hour stop, you did not put a new tape in, correct?

A. That's correct.

Q. And the tape, I take it, that was in your recorder at the time of Dallas Williams' stop ends with recordings on April 22nd prior to 2:15, p.m., true?

A. Probably. I'm not sure when it stopped.

Q. But you didn't bring that tape with you today either, did you?

A. No.

Q. Mr. Williams told you that – about his travel plans [45] while you were still holding his driver's license and his rental agreement, correct?

A. It was on the initial contact, yes.

Q. And Mr. Williams stated he was traveling to Kansas City from Denver to pick his sister up for Easter, correct?

A. Correct.

Q. Mr. Williams was on I-70 at the time he was stopped. True?

A. Yes.

Q. And I-70 is an interstate highway that runs east and west across the northern portion of Kansas, correct?

A. Yes.

Q. Interstate 70 extends from at least Denver to at least Kansas City, correct?

A. Yes.

Q. And Mr. Williams was heading eastbound on Interstate 70 in the direction of Kansas City, correct?

A. Yes.

Q. The location where Mr. Williams was stopped was in Thomas County, Kansas, in fact between Denver and Kansas City, correct?

A. Yes.

Q. The date that you stopped Mr. Williams was April 22nd, 2000.

[46] A. Yes.

Q. That was a Saturday, correct?

A. I don't remember.

Q. Do you remember that the next day would have been Easter Sunday, April 23rd?

A. That makes sense to me, but I don't recall.

MR. MONNAT: May I have just a moment, Your Honor?

THE COURT: Yes. You want to know whether April 23rd was Easter or not? I can take judicial notice.

MR. MONNAT: Okay. I have an almanac here that shows.

THE COURT: I also have it.

MR. MONNAT: Okay.

THE COURT: Go ahead.

MR. MONNAT: Thank you, Your Honor.

Q. Mr. Williams told you that he was to bring his sister who was from Chicago to Denver – strike that. You said on direct examination that you didn't understand why Williams' sister couldn't have driven on to Denver from Kansas City or fly on to Denver from Kansas City, right?

A. Yes.

Q. However, Mr. Williams told you and it appears in your report that Mr. Williams was to bring his sister who was from Chicago to Denver because she did not like to fly. [47] Right?

A. Yes.

Q. So you actually could understand why she couldn't fly from Kansas City to Denver, right?

A. I could – yes, that's correct.

Q. And you said you didn't understand why she couldn't drive on to Denver from Kansas City, but actually Mr. Williams told you and it appears in your report that, quote, Williams said his sister had traveled from Kansas City to Chicago with a friend, end quote, correct?

A. Yes.

Q. So as far as you knew, Mr. Williams' sister had ridden with a friend to Kansas City and the friend stayed in Kansas City and Mr. Williams' sister had no car to drive to Denver, right?

A. I assume.

Q. By the time Williams told you that he was to bring his sister who was from Chicago to Denver, you had already received Mr. William's drivers license from him, correct?

A. Yes.

Q. And the driver's license identified Mr. Williams as living in the same city he said his sister was coming from; namely, Chicago, Illinois, right?

A. Yes. Yes.

Q. By the way, at the time you stopped Mr. Williams, he [48] looked much as he does today and had a mustache on his lip, correct?

A. Yes, I believe so, except for the way he's dressed.

Q. But as to the mustache –

A. That's correct, right. I believe so.

Q. On direct examination – well, strike that. You never asked Mr. Williams before you ordered him detained to explain to you why he had a portable radiō in the car, did you?

A. No.

Q. And the information about the other radio being found in a trash can was something that you learned after you had ordered Mr. Williams detained, correct?

A. Yes.

THE COURT: After you read his rights to him?

A. As far as the question about where the other radio was?

THE COURT: Yes.

A. I believe I asked that question prior to Miranda when I was searching the car, and the interior of the front of the car.

Q. But after he was already detained?

A. Yeah, he was arrested, but without Miranda, I asked where the other radio was or asked him who he was [49] traveling with (indicating), trying to find out where the other radio went.

Q. And he answered your question about who he was traveling with.

A. Yes.

Q. Mr. Williams told you that the same person as was listed in the rental agreement and had loaned the white Lincoln to him so he could pick up his sister in Kansas City, correct?

A. Yes.

Q. In your report, you describe this radio that you saw as a blue portable radio, correct?

A. Yes.

Q. And the first time you saw that was when you first approached Mr. Williams in the white Lincoln, correct?

A. Yes.

Q. And at that time you were standing outside the white Lincoln, correct?

A. Yes.

Q. The blue portable radio was inside the Lincoln.

A. Yes.

Q. Where was it inside the Lincoln when you first saw it?

A. I believe it was in the front passenger's seat.

Q. And around the blue portable radio there were several [50] packs of cigarettes?

A. Yes.

Q. By the way, you mentioned that some people try to hide their nervousness by smoking cigarettes. Is that what you said?

A. It's my opinion they try to do that, yes.

Q. Okay. So you know people may try to hide their nervousness by smoking cigarettes, but you don't know if the nicotine in cigarettes themselves might make people nervous, right?

A. I view that as a possibility in attempting to hide nervousness.

Q. Well, when you stopped Mr. Williams he wasn't smoking a cigarette, was he?

A. I don't recall.

Q. There's nothing in your true and complete report containing all details of legal significance to suggest he was smoking a cigarette, is there?

A. No.

Q. The – at the time you first saw the blue portable radio you made no mental note about its model number, did you?

A. No.

Q. And at the time you first saw the blue portable radio you made no mental note about its brand name, did you?

[51] A. No.

Q. Now, after you arrested Mr. Williams you say in your report: At 1435 I read Williams his Miranda rights. I then searched the passenger compartment of Williams' car and found the blue radio I saw before. I recognized the radio to be one that transmits a short distance. This led me to believe that Williams was traveling with someone in a separate vehicle necessitating a portable radio. That appears in your report.

A. Yes.

Q. It was after Mr. Williams' arrest, then, that you first recognized that the blue portable radio was the kind of radio that transmitted and received, correct?

A. I knew it was that type of radio beforehand when I first – on my initial contact, I knew that was the type of radio it was.

Q. And that's because you're fairly familiar with Motorola 250 Talk-About portable radios?

A. I've seen them before and used them myself.

Q. Since you have used such portable radios, as you say, yourself, I take it you've seen such radios in other cars you've stopped on Interstate 70, correct?

A. Not like these.

Q. Not like the portable Motorola Talk-About 250 radios?

A. No.

* * *

[53] MR. WELCH: Object as calling for speculation.

MR. MONNAT: He told us about common knowledge in looking at the radio.

THE COURT: He may answer.

A. It reminds me of the advertisement on the box.

Q. And –

THE COURT: What did you say? Wait a minute.

A. It reminds me of the advertisement on the box that you buy them in at Wal-Mart. That's what they say on the front.

THE COURT: But you've seen those boxes?

A. Yes.

THE COURT: All right.

Q. And those boxes say that you can use those radios to keep in touch with family and friends while hunting, fishing, biking, backpacking, hiking or skiing, correct?

A. That sounds correct.

Q. Based on your familiarity with the area of Kansas that you patrol, many of the cars that pass through Thomas County, Kansas on Interstate 70 are going to or returning from the state of Colorado, correct?

A. I would agree to that, yeah.

Q. And Colorado is widely recognized as a vacation [54] place, correct?

A. Yes.

Q. Rocky Mountains are in Colorado, correct?

A. Yes.

Q. And in Colorado families can do the kind of activities we just talked about, backpack, hike, fish, camp and ski, correct?

A. Yes.

Q. So portable radios such as you found in Mr. Williams' car may be found in the vehicles of many innocent travelers on Interstate 70 in Thomas County, correct?

MR. WELCH: Objection. Calls for speculation of what may be found. We don't know, and it frankly is not important today what this trooper has seen. What's important –

THE COURT: No. It's obvious it can be found anywhere, if it's sold as widely as you're talking about. You may answer the question if you know.

A. Okay. Yes, it may be found in many vehicles.

Q. Many vehicles of innocent travelers, correct?

A. Correct.

MR. MONNAT: May I have just a moment, Your Honor?

THE COURT: Yes.

Q. Earlier you told us that you made a truthful report [55] in this case, correct?

A. Yes.

Q. In your truthful report you say that after you handed Mr. Williams his license and rental agreement and a warning citation, quote: I then released Williams by saying, thanks a lot, we'll see 'ya, end quote, correct?

A. Yes.

Q. And by the word released in your report, you meant to communicate to a reader of your report that at the time you said, thanks a lot, we'll see 'ya, Mr. Williams was free to drive away from your presence, correct?

A. Yes.

Q. And, in fact, when you said to Mr. Williams, thanks a lot, we'll see you, you honestly intended to communicate to Mr. Williams that he was free to leave your presence and was no longer being detained, right?

A. That's correct.

Q. Now, as a well trained law enforcement officer and protecter [sic] of the public, you do not tell people whom you reasonably suspect of being involved in criminal activity that they're free to leave the presence of a law enforcement officer and be on their way, do you?

A. Do I actually tell them that?

Q. Yes, sir.

A. No, I don't use those words.

[56] Q. No. I mean – here's what I mean. As a law enforcement officer and protecter [sic] of the public, if you reasonably suspect that somebody is engaged in criminal activity, you do not say to them, oh, go on your way, I don't need to hold you here, do you?

MR. WELCH: Your Honor, I'm going to object to the question. Mr. Monnat knows it's a ridiculous question. The fact is that the trooper, being a well trained trooper, is simply following procedures taught to him as following case law both in the state of Kansas and Tenth Circuit that motorists have to be engaged in further conversation. That's what he was doing that day. We all know what was happening that day.

MR. MONNAT: I don't know what the prosecutor's trying to hint to the witness by that long speech, but I see nothing wrong with the question, Your Honor.

THE COURT: He may answer.

A. Would you repeat the question?

Q. Sure. As a trained law enforcement officer and protecter [sic] of the public, if you reasonably suspect somebody of being involved in criminal activity, you don't say to them, go on, you're free to go, do you?

A. Not anymore.

Q. And in your training you have always known that if [57] you reasonably suspect somebody of criminal

activity, you owe it to the public to detain them and investigate that, correct?

A. Yes.

Q. By the time you said to Mr. Williams, thanks a lot, we'll see 'ya, you had already seen the nervousness that you say is extreme, correct?

A. Yes.

Q. By the time you said to Mr. Williams, thanks a lot, we'll see 'ya, and released him, you'd already seen the portable radio, correct?

A. Yes.

Q. By the time you said to Mr. Williams, thanks a lot, we'll see 'ya, you had already heard his explanation of his travel plans, correct?

A. Yes.

Q. By the time you said to Mr. Williams, thanks a lot, we'll see you, you had already seen the cigarette packs and the duffle bag in the back, correct?

A. Yes.

Q. By the time you said to Mr. Williams, thanks a lot, we'll see 'ya, you had already read the rental agreement, correct?

A. Yes.

Q. After you said to Mr. Williams, thanks a lot, we'll [58] see 'ya, the only other suspicious factor that you noticed before you detained him was that he declined to consent to search his car, correct?

A. May I review my narrative real quick –

Q. Sure.

A. – before I answer that? There was other suspicious factors in there. I would say no to that question.

Q. Your report says: I – your report says, quote: I then released Williams by saying, thanks a lot, we'll see 'ya, correct?

A. Yes.

Q. The next sentence then says: I then asked Williams if I could ask him a few more questions, correct?

A. Yes.

Q. Williams said sure, correct?

A. Yes.

Q. The next sentence then says: I asked Williams if he had anything illegal in his car like drugs or large – or like drugs, guns or large amounts of cash, correct?

A. Yes.

Q. The next sentence says: Williams said no, correct?

A. That's correct.

Q. I asked Williams if I could search his car. Williams said no, correct? And that's the next sentence, right?

[59] A. Yes.

Q. And you then say: I detained Williams, correct?

A. Yes.

MR. MONNAT: No further questions. Thank you, Your Honor.

THE COURT: All right.

MR. MONNAT: Thank you, sir.

THE COURT: Mr. Welch.

MR. WELCH: Thank you, Judge.

REDIRECT EXAMINATION

BY MR. WELCH:

Q. Trooper, the radio that Mr. Monnat asked several questions about, from your training and/or experience as a Kansas Highway Patrol trooper, have you learned that on occasion people trafficking narcotics travel in tandem on the highway?

A. Yes.

MR. MONNAT: Objection. It's based –

MR. WELCH: Asked him about his training and experience.

MR. MONNAT: And, Judge, he said on direct he had no particular training about it, just common knowledge.

A. Of the radios.

MR. WELCH: Yeah. My point is, Judge, what

* * *

[65] Q. But you were going to let him go anyway, right?

A. I'm sorry?

Q. But you were going to let him go anyway, right?

A. My intent –

Q. Yes.

A. – was to give him the impression that he was released or free to go, then I asked, do you mind if I ask you a few more questions.

Q. So he was – so what you're saying is that Mr. Williams was never free to go from the time you stopped him, correct?

A. Sure he was.

MR. WELCH: Objection. That's not what he was saying.

Q. Was your intent to trick Mr. Williams into thinking he was free to go or was he really free to go?

A. He was free to go.

MR. MONNAT: Nothing further.

A. But he volunteered to answer questions.

MR. WELCH: I have one follow-up.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. WELCH:

Q. Trooper, at the time you first saw the radio sitting on the front seat of the car, did you have any description

* * *

[83] Q. Have you had any previous law enforcement experience or training?

A. Yes, sir.

Q. Would you state to the Court what that was, please.

A. From 1970 until 1975 I was a special agent in the Kansas Attorney General's office under Attorney General Kent Frizzel and Attorney General Vern Miller.

Q. And do you from time to time do private investigative work for my office?

A. Yes, sir.

Q. Are you familiar with the Motorola 250 Talk-About radio?

A. I am.

Q. And would you tell the Court, first of all, what that is.

A. It's a little walkie-talkie type device that operates on a family radio service band, has 14 channels.

Q. How have you become familiar with the Motorola 250 Talk-About?

A. I purchased –

MR. WELCH: Dan, Dan.

(Off-the-record discussion.)

THE COURT: Did that consultation lead to anything?

MR. MONNAT: I think it will speed things [84] up, too, Your Honor.

THE COURT: Okay. Fine.

A. I purchased two of them for use at my office.

Q. And have you become familiar with the uses to which the Motorola 250 Talk-Abouts are put?

A. I have.

Q. and have you read catalogs about the Motorola 250 –

A. Yes.

Q. – and its uses?

A. Catalogue that I found in my office.

Q. Do the catalogs that you found in your office describe those uses?

A. Yes, sir.

Q. Have you brought that literature with you to court?

A. Yes, sir, I have.

Q. Let me hand you, then –

MR. MONNAT: May I approach the witness?

THE COURT: Yes, you may.

Q. Let me hand you, first of all, what's been previously marked as Defendant's Exhibit A, and I'll ask you, is that a catalogue that you received in your office?

A. Exhibit A is a catalogue addressed to me at my office.

Q. All right. And is that a Cheaper Than Dirt catalogue?

[85] A. Yes, sir, it is. It's the issue for March 2000.

Q. Does the rear page of that depict a Motorola 250 Talk-About?

A. Yes, sir, the back cover page.

Q. And does it describe some uses to which that can be put?

A. Yes, sir.

Q. Would you tell the Court what those are.

MR. MONNAT: But first I'd move to admit that exhibit, Your Honor.

MR. WELCH: Your Honor, I have no objection to that, and I'm prepared to stipulate that these radios can be used for both legal and illegal purposes, if that will help speed this along.

THE COURT: Does it help?

MR. MONNAT: I'd still like to put the exhibits in. I'll move it right along, though, Your Honor.

MR. WELCH: Are they all catalogs, Dan?

MR. MONNAT: Yes, they're all catalogs except there's a brochure for the Motorola Talk-About, and a box for the Talk-About two-way radio.

MR. WELCH: Judge, I have no objection to any of that.

THE COURT: They will be admitted without [86] objection.

MR. MONNAT: Let me then state for the record, Your Honor, we'd move to admit Defendant's Exhibit A, Defendant's Exhibit B, which is an Office Depot catalogue, Defendant's Exhibit C, which is a winter '99 Cheaper Than Dirt catalogue, referring to page 67 of that catalogue.

THE COURT: What pages are you referring to in the others?

MR. MONNAT: As to Exhibit A, it would be the back cover of Exhibit A.

THE COURT: Why don't you just state what they are and just put the pages in. That just clutters up – those whole documents, it just takes space, which can be a problem.

MR. MONNAT: I understand, Your Honor. I'd be happy to substitute photocopies later on. The reason I didn't was because of, A, the requirement of originals, and, B, they're sometimes hard to copy so you can read them.

THE COURT: That will be fine. Just substitute copies, because I want them withdrawn.

MR. MONNAT: All right.

THE COURT: I don't want to – I just don't see any reason to have the whole book there.

[87] MR. MONNAT: As to Exhibit B, we're referring to page 746 of that, Your Honor.

THE COURT: I see a catalogue that's an inch thick or more. You've got a box there that's –

MR. MONNAT: As to Exhibit C, we're referring to page 67 of that catalogue. As to page – Exhibit D, we're referring to page 57 of that catalogue. As to Defendant's Exhibit E, we're referring to page 65 of that catalogue. Defendant's Exhibit F is just a pamphlet that we're referring to the entirety of, and Defendant's Exhibit G is a box that the Talk-About two-way radio comes in. We're referring primarily to the back of that box, Your Honor.

THE COURT: All right.

Q. Now, with respect, Mr. Goad, to the exhibits in front of you which have been admitted, Exhibits A through G, do those exhibits themselves talk about the family service radio nature of the Motorola 250 Talk-About.

A. Yes, sir.

Q. Can you summarize for the Court what the uses depicted in the catalogues and on the box for the Motorola 250 Talk-About are.

A. Yes, sir. The uses are itemized throughout these catalogues as use in warehousing, use in trade shows, for keeping track of the children at the mall, keeping track [88] of children in the neighborhood, for caravanning, for family trips, for sporting events and activities such as skiing, fishing, hiking, golfing, backpacking, boating and hunting. I think the – they don't usually mention hunting.

Q. I take it you've been to Colorado before in your life, is that correct?

A. Yes, sir.

Q. Are many of those activities depicted in the literature about the Motorola 250 Talk-About activities that you can engage in in the state of Colorado?

A. Yes, sir, many of them.

MR. MONNAT: May I just have a moment, Your Honor.

THE COURT: Yes.

MR. MONNAT: No further questions of this witness, Your Honor.

THE COURT: Any questions?

MR. WELCH: No questions, Judge.

THE COURT: You may step down.

MR. MONNAT: We'd rest, Your Honor. Thank you.

THE COURT: Anything further?

MR. WELCH: No, sir.

THE COURT: I think the Court would like. . . .

* * *